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REPORTS OF CASES

HEARD AND DETERMINED

BY THE

JUDICIAL COMMITTEE

AND THE

LORDS OF THE PRIVY COUNCIL,

ON APPEAL FROM THE SUPREME AND SUDDER DEWANNY COURTS IN THE EAST INDIES.

SHEIKH IMDAD ALI and others - *Appellants*,

AND

MUSSUMAT KOOTBY BEGUM - *Respondent*.*

On Appeal from the Sudder Dewanny Adawlut of Bengal.

4 Dec. 1841, & 25 June 1842.

THIS suit was instituted by the Respondent, *Mussumat Kootby Begum*, claiming as her inheritance an

The fact of residence at a distance of 900 miles from the place where the subject matter in dispute was situate: held insufficient to bring a party within the exception of the *Bengal* Regulations of Limitation, (III. of 1793, s. 14, and II. of 1805, s. 3;) the party in possession of the property being a purchaser for a valuable consideration without notice, and

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*,—Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

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interest in certain *mouzas* and other real estate situate in *zillah Patna*, alleged to have been the estate of her deceased mother, *Mussumat Saleha Khanum*, and for damages on account of the annual produce thereof.

The Plaint was filed on the 2nd of *April* 1825 in the Provincial Court of *Patna*, against the Defendants, who were in possession of the estates, and claimed to be entitled thereto as purchasers for valuable consideration without notice; and set forth—That *Mussumat Saleha Khanum* died on the 3rd *Bysak*, 1207 *Fusly* (12th *April* 1800), [c] leaving the Plaintiff, her only daughter, two grandsons, *Amin Oolla Khan* and *Kulb Ali Khan*, and one granddaughter, *Gusety Begum*, as heirs. That thereupon the whole of her estate, in conformity to *furraiz* (law of inheritance), became divisible into one hundred and sixty shares, eighty shares the right of the Plaintiff, sixty-four shares, in equal portions, the right of *Amin Oolla Khan* and *Kulb Ali Khan*, and sixteen shares the right of *Mussumat Gusety Begum*; that the Plaintiff resided in *kusba Paniput*, in the province of *Delhi*, subordinate to *Shahjehanabad*, and that *Amin Oolla Khan* and *Kulb Ali Khan*, without her knowledge, and in her absence, had gifted, sold, or otherwise alienated to various persons, through whom the Defendants claimed, the whole of the *mouzas* in question, including the share of the Plaintiff, and the share belonging to *Gusety Begum*. It then stated a suit instituted by *Gusety Begum*, claiming a certain share of the property in question, and assigned rea-

the Plaintiff's right of action having accrued twenty-five years before the institution of the suit.

Evidence tendered to the *Sudder* Court on a Petition for review, which was refused and the order of refusal not appealed from, though forming part of the transcript, cannot be referred to in the argument upon the Appeal from the original Judgment.

sons for not making her a Defendant to the Plaint, and alleged that in consequence of the Plaintiff's distant residence, (being upwards of nine hundred miles from *Patna*,) she had no information of these matters.

The Defendants severally put in their answers, denying the Plaintiff's title, but insisting as to some, on their right as purchasers for valuable consideration without notice, and as to others, on an undisturbed possession for fourteen years.

On the 10th of *April* 1827, the Plaintiff filed a supplemental Plaint for the purpose of making other parties Defendants, who were alleged to be in possession of some of the property in question, stating, that in consequence of her distant residence she was not sufficiently informed of the persons who were respectively in the seizin and possession of the estate in dispute, but had learnt the fact from the answers of the Defendants.

On the 14th *April* 1827, the Plaintiff replied, insisting on her title to the property in question, and alleging that as *Amin Oolla Khan* and *Kulb Ali Khan*, from whom the Defendants claimed, came into possession by violence, she was entitled to, and claimed, the benefit of section iii. of Reg. II. of 1805, which in such case extends the period of limitation to sixty years, and as it appeared that the first sale or transfer made by *Amin Oolla Khan* and *Kulb Ali Khan* was on the 20th *Bhadoon*, 1221 *Fusly* (21st *August* or *September* 1814), and the others subsequent to that date, which was less than twelve years prior to the institution of the suit, the claim of the Plaintiff was not precluded by section ii., Reg. II. of 1805, which had been relied upon by the Defendants; she claimed also the benefit of the 14th section of Reg. III.

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of 1793, on the ground that she was and had been resident in a distant country. She also insisted that having been resident in a distant country, and not being aware of the sale, her claim was not barred by the lapse of time, or possession for above twelve years.

On the 13th of *June* 1827, the fourth Judge of the Provincial Court of *Patna* (Mr. *Steer*) decreed that the Plaintiff's claim was barred by clause 3, sect. iii., Reg. II. of 1805, and dismissed the suit with costs.

From this Decree, the present Respondent appealed to the *Sudder Dewanny Adawlut* of *Bengal.*

On the 18th of *May* 1831, the cause came on for hearing before *C. T. Sealy*, Esq., one of the Judges of the *Sudder Dewanny Adawlut*, who recorded his opinion as follows:—

"In my opinion, in this case two things require consideration:—

"1st. Whether the villages in dispute were the estate of *Saleha Khanum*, or not? and—

"2nd. Whether the Plaintiff's suit was instituted within the limited period of hearing, or not?

"By the decision of the Provincial Court, confirmed by this Court, regarding the case of *Gusety Begum* against *Kulb Ali Khan*, and others, and the law opinion of the *Moofti* of the Provincial Court filed in that case, the villages in dispute were proved to be the estate of *Saleha Khanum*, and the objections and declarations of *Mussumat Beejy Begum* and other Defendants on that subject are inadmissible; and the documents filed by them, unsupported as they were by any substantial testimony, are not deemed worthy of credit. And as in section iii., Reg. II. of 1805, it is unequivocally prescribed that the claim of a Plaintiff for possession of immoveable property

that may have been in the possession of an usurper for twelve years, and in the possession of the present possessor (whether by right of purchase or by any other good means) for less than twelve years, is entitled to a hearing and trial,—under this circumstance, and with reference to *khedarut* (concealment of women for the sake of modesty), and distant residence of Plaintiff, her claim, as touching *mouza Rupuspoor-oorf Salarpoor*, and *Hissa Chuk*, *Zahed Tilhar*, and *Churwan*, from the date of sale whereof, to the date of the institution of this suit, a period of twelve years having apparently not elapsed, is worthy of being decreed to her; and as touching *Mohi-ood-deen-poor*, and land measuring 3,000 *beegas* from *mouza Churwan*, from the date of sale whereof, up to the date of the institution of the suit, twelve years having elapsed, it is worthy of being dismissed: consequently it is ordered, that the decision of the Provincial Court, dated 13th of *June* 1827 C. E., be modified, that the claim of the Appellant touching *mouza Rupuspoor-oorf Salarpoor* and *Hissa Chuk*, *Zahed Tilhar*, and *mouza Churwan*, with the exception of *mouza Mohi-ood-deen-poor*, in the possession of *Byjnath Sahoo*, and with the exception of land measuring 3,000 *beegas* in *mouza Churwan*, in the possession of *Narain Das*, be decreed to her, and costs of both the Courts, account the claim proved be defrayed by Respondents; and account the claim not proved, by Appellant, respectively; and that the papers be referred for a second voice."

On the 31st of *May* 1831, the *Sudder Dewanny Adawlut* made its final Decree, by which, after concurring in the opinion of *C. T. Sealy*, Esq., it was finally ordered and decreed, that the decision of the *Patna* Provincial Court, dated 13th *June* 1827, dis-

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missing the suit of the Plaintiff, be amended in accordance with the opinion of Mr. *Sealy*, as above stated; the costs of the claim proved, to be defrayed by Respondents; and the costs of the claim not proved, by Appellants, respectively.

Sheikh Imdad Ali and other Respondents (the present Appellants) afterwards presented a Petition to the Court, praying for a review of Judgment, on the ground that the lapse of twelve years applied to the village of *Rupuspoor-oorf Salarpoor*, it having been in the possession of *Boorham Ali Khan* (the first purchaser) and the Petitioners for more than twelve years, and they tendered two deeds of sale made by *Amin Oolla Khan* to *Boorham Ali*, dated 16th *Rajab*, 1227 *Hijra* (26th *July* 1812), for half of *Rupuspoor*, and the other deed of sale dated 21st *Rabi-no-sani*, 1230 *Hijra* (2nd *April* 1815), for two-fifths of *Rupuspoor*, in support of their allegation.

The *Sudder Dewanny Adawlut*, on the 21st of *November* 1831, refused the prayer of this Petition.

From the above Decree of the 31st of *May*, the Appellants appealed to his late Majesty in Council; the Appellants, however, did not appeal from the order refusing a rehearing.

Pending the appeal, and before it came on for hearing, one of the Appellants entered into an agreement with the Respondent to compromise and withdraw his appeal, and presented a Petition to Her Majesty in Council, praying that his name might be erased or withdrawn from the proceedings on appeal in *England*, and that the agreement of compromise might be carried into effect under the order and direction of the *Sudder* Court.

The Petition to withdraw came on for hearing with the appeal, and was allowed in the terms of the prayer.

On the opening of the case, an objection was taken by the Respondent's Counsel, to the Appellants referring to or reading as evidence in the appeal the documents tendered to the *Sudder* Court on the application for a review of Judgment, inasmuch as the order refusing such application had not been appealed from.

Their Lordships were of opinion, that as the appeal was from the Decree of the 31st of *May* 1831 only, the objection was valid, and that the subsequent order not being appealed from, the documents produced to the Court ought not to have formed part of the transcript.

Mr. *Miller*, Q. C., Mr. *L. Wigram*, Q. C., and Mr. *Jackson*, for the Appellants.

The Appellants are purchasers of the property in dispute for a valuable consideration, without notice of the Respondent's claim, who suffered it to be dealt with without preferring any claim, and, moreover, has assigned no sufficient reason for the delay in prosecuting her claim for a period of twenty-five years after her title accrued. The mere fact of residence in a distant country will not prevent the operation of the Regulations of Limitation. *Bhaee-chund* and *Koosal-chund* v. *Purtab-chund Manik-chund* (*a*).

The claim of the Respondent to that part of the *Altamgah mahals* in the possession of the Appellants, which was purchased by their ancestor from *Beejy Begum*, is moreover barred by sect. xiv., Reg. III. of 1793, and clauses 1st and 3rd of sect. iii., Reg. II. of 1805, inasmuch as the same has been held under a fair title, within the meaning of the Regulations, since the 9th of *July* 1801; upwards of twenty-three years before the institution of the suit. The claim

(*a*) 1 Moore's Indian Appeal Cases, 154.

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also of the Respondent to that part of the *Altamgah mahals* in possession of the Appellants, which was purchased by them from *Sheikh Boorham Ali*, is barred by the same Regulations, inasmuch as the same was held under a fair title, within the meaning of the Regulations, twelve years before the institution of the suit. *Lal Rooderpurtab Sing* v. *Lal Dhokul Sing* (*a*). *Radachurn Mohapatur* v. *Gunganaraen Mohapatur* (*b*). *Mussummaut Zureenah Beebee* v. *Khajah Ali* (*c*). *Moohummud Yar Khan* v. *Moohummud Eesau Khan* (*d*).

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

It is proved by the evidence in the cause, that the Altamgah mahal in question was the estate of Saleha Khanum, the mother of the Respondent, and that she was in the seizin and possession thereof at the time of her death; and by the *Mahomedan* law of inheritance was entitled to eighty shares of one hundred and sixty shares (as claimed by her Plaint) of the estate of her deceased mother. The title cannot be disputed.

The ordinary period of twelve years for the institution of suits, as provided by Reg. III. of 1793, sect. xiv., and Reg. IV. of 1805, is not applicable to the circumstances of the present case; but with reference to those circumstances, so far as relates to the portions of the estate which are specified in the decree of the *Sudder Dewanny Adawlut*, the Plaint was filed within the period allowed by the Regulations. *Tubeeb Shah* v. *Budder Oodeen* (*e*).

6th July.

Mr. Justice ERSKINE:

The original proceedings in this case were instituted

(*a*) 1 Mac. Sud. R. 253.
(*b*) 1 Mac. Sud. R. 297.
(*c*) 3 Mac. Sud. R. 32.
(*d*) 3 Mac. Sud. R. 292.
(*e*) 3 Mac. Sud. R. 162.

by the present Respondent, *Mussumat Kootby Begum*, in the Provincial Court at *Patna*, to recover sixty-four shares out of one hundred and sixty shares of an *Altamgha mahal* in the *zillah* of *Patna*, comprising several villages, which she claimed as her inheritance, derived from her mother, *Mussumat Saleha Khanum*, the widow of *Nawab Eneyet Khan*.

In the Court below, two questions were raised and decided. First, whether the *mahal* in question was originally the estate of the *Nawab* or of his widow, *Saleha Khanum*; and, secondly, whether the claim of the Plaintiff, *Kootby Begum*, had been barred by the lapse of time according to the *Bengal* Regulations.

The Provincial Court, without giving any opinion on the first point, dismissed the Plaintiff's suit with costs, upon the ground that whatever her right might have been, her remedy by suit was barred by lapse of time, and that her claim was not entitled to a hearing by the Court. Against this Decree the Plaintiff appealed to the *Sudder Dewanny Adawlut*, and that Court, after hearing the appeal on the 31st of *December* 1831, decided, first, that the villages in dispute had been proved to have been the property of *Saleha Khanum*, and that the Plaintiff, as her daughter, was entitled to one-half as her inheritance; and, secondly, that although as to some of the villages the claim of the Plaintiff had been barred by lapse of time, that as to the rest, her remedy had not been taken away by the Regulations relied on.

The Court, therefore, modified the decision of the Provincial Court, by affirming its decree as to a part of the estate, and decreeing to the Plaintiff the remainder, and apportioning the costs between the parties.

The present Appellants, who had defended the suit

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below as purchasers, were dissatisfied with the decision of the *Sudder Dewanny Adawlut*, and appealed to the Queen in Council against that part of the Decree that affirmed the Plaintiff's right to recover a portion of the property claimed by her. And Her Majesty having been pleased to refer such appeal to the Judicial Committee, the case was argued before Lord *Brougham*, Lord *Campbell*, the Judge of the Admiralty, and myself, when on the part of the Appellants it was insisted, that whatever might have been the original title of the Plaintiff below, that her right to recover any part of the property had been altogether barred by the lapse of time, and that the Decree of the Provincial Court ought to have been wholly affirmed. Their Lordships acquiesce in this conclusion, and are of opinion that the decision of the Provincial Court was right, and that the Decree of the *Sudder Dewanny Adawlut* modifying it is wrong.

In order to explain the ground upon which their Lordships have founded their opinion, it will be necessary to refer more particularly to the facts established by the evidence, and to the language of the Regulations upon which the question arises.

It appeared by the evidence that *Saleha Khanum* was the wife of the *Nawab Eneyet Khan Rasikh*, and that they had three children, two sons and one daughter. It is clearly proved by the admissions of those under whom the Appellants claim as purchasers, as well as by other evidence, that the *mahal* in question was the property of *Saleha Khanum*, and that she having survived her husband, held possession of it until her death in 1801. The two sons died in their mother's lifetime. The daughter, the present Respondent, and the Plaintiff below, was living with her

mother at *Paniput* at the time of the mother's death. The eldest son, *Izzud Oollah Khan*, had died without issue. *Hafiz Oollah Khan*, the second son, had died only a few months before his mother, and had, down to the time of his death, managed the estate for his mother. He left three children, two sons and one daughter. Under these circumstances, by the *Mahomedan* law of inheritance, the Plaintiff below became entitled to one-half of her mother's property, and the other half would descend to the children of her brother *Hafiz*.

These children were *Kulb Ali Khan*, *Amin Oollah Khan*, and *Mussumat Gusety Begum*. Upon the death, however, of *Saleha Khanum* in 1801, *Kulb Ali Khan* and *Amin Oollah Khan* took possession of the whole of the estate, and dealt with it as if it were entirely their own; and until the year 1812 neither their aunt nor their sister preferred any claim to any part of the inheritance.

On the 4th of *March* in the year 1812, *Mussumat Gusety Begum*, the sister, instituted proceedings in the *Patna* Provincial Court against her two brothers, to recover a fifth share of the *mahal;* and by the Decree of that Court, which was afterwards, in the year 1818, confirmed upon appeal by the *Sudder Dewanny Adawlut*, she recovered one-fifth of the whole estate as her share of the inheritance from *Saleha Khanum*. It is to be observed, that the claim of the sister and the resistance on the part of the brothers proceeded on the assumption that the whole inheritance had descended from *Saleha Khanum* to the children of *Hafiz Oollah Khan*, and that no allusion was made in the course of the suit to any claim of their aunt, the present Respondent, although her name is stated to have been

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registered in the Collector's Office. It appeared that long prior to the commencement of this suit, namely, in the year 1801, *Kulb Ali Khan* had settled one-half of the property which he claimed as his share upon his wife, *Beejy Begum*; and *Amin Oollah Khan* had in 1805 transferred his share to his son, *Azim Oollah Khan*; but neither of these transfers appear to have been acted upon further than by having the names recorded in the Collector's Office, and the two brothers had continued to deal with the property as their own; for in the year 1807, *Kulb Ali Khan*, acting for himself and his brother, sold a part of the estate to *Baboo Bysnath Sahoo*, and although in the years 1813, 1814, *Beejy Begum* assumed the power of selling portions of the estate, there is no evidence that *Azim Oollah Khan* ever acted as owner of any part of the estate under the alleged transfer to him; but, on the contrary, *Amin Oolla Khan*, his father, continued to dispose of the estate as if no such transfer had been made, and the Appellants at the trial below rested their claim entirely upon purchases made from *Beejy Begum* and *Amin Oollah Khan.*

The dates of those sales, as proved in the progress of the suit, were in the years 1813, 1814, within twelve years from the commencement of the Respondent's suit, and these dates formed the foundation of the Decree of the *Sudder Adawlut*, which decided, that the Plaintiff's remedy had been barred as to *Mohi-ood-deen*, sold by *Kulb Ali Khan* in 1807—more than twelve years before the commencement of the suit, but was not barred as to the residue, which did not appear by the evidence to have been sold before the years 1813 and 1814.

After the Decree had been pronounced, the Appel-

lants petitioned to have the cause heard again, and to be allowed to put in evidence other Deeds, to prove, that as to another portion of the estate, the remedy of the Plaintiff had been barred by a sale beyond the twelve years, namely, in 1812, to *Boorham Ali Khan*, from whom the Appellants purchased that portion in 1824. The Court however refused, and we think properly, to re-open the case, for the purpose of admitting evidence which ought to have been produced in the first instance, and there is no Appeal from that refusal: the question therefore for decision is, whether, under the circumstances of the case, the remedy of the Plaintiff had been barred by the adverse possession of *Kulb Ali Khan* and *Amin Oolla Khan*, from the year 1800 to 1825.

The answer to this question depends upon the construction of the *Bengal* Regulations, namely, Reg. III. of 1793, s. 14, and Reg. II. of 1805, s. 3. By Reg. III., s. 4, *Zillah* and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it—unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the Defendant had admitted the truth of the demand, or promised to pay the money; or that he had directly preferred his claim within that period, for the matters in dispute, to a Court of competent jurisdiction, to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit; or shall prove that either from minority or other good and sufficient cause he had been precluded from obtaining redress.

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Now in this case the Plaintiff's cause of action arose twenty-five years before the commencement of the suit, and no other suit was ever instituted by her on account of it. Her claim therefore is clearly barred, unless she can by proof bring herself within one of the exceptions. The only exception under this Regulation, from which any protection has been claimed, is the last, namely, that she has been precluded from obtaining redress by a good and sufficient cause; and the cause relied on, is the distance of her residence from the estates in dispute, and from the tribunal before which alone she could have preferred her claim. It appears by the evidence that the Plaintiff lived at *Paniput*, several hundred miles from *Patna*; but as the distance in 1800 could have afforded no greater impediment to the appointment of a *Mokhtar* to enforce her rights, than it did in 1825, the only way in which it can be said to have precluded her from obtaining redress, would be, by keeping her in ignorance of the manner in which her rights had been usurped by her nephews; but it must be remembered that her mother died at *Paniput*, and that her right to one half of the estate devolved upon her immediately upon her mother's death, and that her not receiving any remittances on account of the estate must have afforded sufficient notice to her, that some one must be usurping her rights, and this not for one or two years only, but for a series of more than twenty years, during which time she appears to have made no inquiry, nor to have instituted any proceedings to assert her claim, but permitted her nephews to hold themselves out to the world as the sole owners of the estate.

When, therefore, the question arises between the purchasers of an estate from persons who had been

thus permitted to hold themselves out to the world for more than twelve years before the purchase, and an owner, by whose neglect they had thus been enabled to assume the character of proprietors, the Court ought to have some other facts than mere distant residence, to make out the proof of some good and sufficient cause that had precluded an earlier assertion of a right that must have been well known to the claimant from the beginning. The Appellants had every reason to assume that the two nephews were the owners, not only from their long and undisputed possession, but also from the circumstance, that when a claim to some share was, in the year 1812, asserted by the sister, no suggestion of the Plaintiff's claim was interposed by her or on her behalf.

Let us then see whether there is anything in the Regulations of 1805, that open to the Plaintiff the doors of the *Zillah* Court, which the Regulations of 1793 had closed.

By Reg. II. of 1805, s. 3, it is declared that the limitation of twelve years, fixed by the Regulation of 1793, "shall also not be considered applicable to any private claims of right to lands, houses, or other permanent immoveable property, if the person or persons in possession of such property, when the claim of right thereto may be preferred in a competent Court of Judicature, shall have acquired possession thereof by violence, fraud, or any other unjust, dishonest means whatever; or if such property shall have been so acquired by any other person or persons from whom the actual occupant or occupants may have derived his or their title, and shall not have been subsequently held under a just and honest title (such as inheritance, purchase, fair donation, or any other fair title, believed to

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have conveyed a right of possession and property), during a period of twelve years, antecedent to the time of preferring a claim of right thereto, in a competent Court: provided that such violent, fraudulent, unjust or dishonest acquisition, be established to the satisfaction of the Court in which the claim may be preferred; or if the suit be appealable to the satisfaction of the proper Court of Appeal." And by the 3rd clause of the same section, after prohibiting the Courts from taking judicial cognizance of any suit preferred after sixty years' non-prosecution, the Regulation proceeds to declare, that 'although the property claimed may have been acquired by an insufficient title within the period of sixty years, if the property so acquired shall have descended by inheritance to the person in possession, when the claim is preferred, or if such person shall have obtained just and honest possession thereof by purchase, fair donation, or by any other title believed to be just and valid, and not appearing to be in any respect collusive, for the purpose of depriving Plaintiff of his right, and either such occupant himself, or any other person in his behalf, or from whom the property may have been obtained under any of the titles aforesaid, or the whole in succession shall have held quiet and unmolested possession under a title believed to be just and valid during a period of twelve years antecedent to the claim thereto being preferred in a competent Court, the provisions made in the 1st and 2nd clause of that section shall not be considered applicable to any private claims to property so circumstanced, which are therefore to be deemed inadmissible as heretofore after twelve years from the origin of the cause of action, unless the same be cognizable under the exceptions and provisions already in force.'

Under this Regulation the Plaintiff contends that although her claim was not preferred to any competent Court till more than twelve years after her cause of action had arisen, yet that as her nephews had acquired possession of the property by unjust and dishonest means, and as the purchase by the Appellants, however fair and just, had been made within twelve years, neither they nor any person under whom they claimed, had, during a period of twelve years, antecedent to the time of preferring her claim, held under any fair title believed to have conveyed a right of possession and property, and therefore that the prohibition contained in the Reg. III. of 1793, s. 14, was not applicable to her case.

In considering the provisions above referred to, it must be kept in mind that one, the main object of these laws of limitation, is to protect an honest purchaser from the consequences of an owner's neglect to assert his rights, and thus giving to a usurper the semblance of a title which he did not really possess, and that by the express words of the Regulation, the proof of the fraudulent, unjust, or dishonest acquisition is thrown upon the Plaintiff. It is necessary therefore to ascertain what is meant by an unjust or dishonest acquisition: it is obvious from the 3rd clause of the section, that it is not intended to include every acquisition without a just title; for by that clause, acquisitions are protected that have been obtained by any title believed to be just and valid, though in reality insufficient. It must be necessary, therefore, for a Plaintiff, in the first place, to show that the person under whom an occupant, by just title, acquired within the twelve years, derives his title, had acquired his possession by a title which he did not at the time believe to be just and valid.

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The Plaintiff in this case contends, that as her nephews must have known that one half of the inheritance belonged to her, and as they must have known that she was still alive, their assumption of the entire property was a dishonest acquisition, and could not have been claimed by them under any title which they believed at the time to be just and valid. It cannot be denied that there are many circumstances leading to a strong suspicion that this was the case, and the *Sudder Adawlut* appears so to have considered it.

But strong as the grounds of suspicion undoubtedly are, their Lordships do not consider the facts proved as sufficiently establishing, to their satisfaction, that the nephews knew that they had no right to the whole estate. They may have originally taken possession under the belief that their father *Hafiz* had acquired a title to the property of which he had been in possession up to his death. They may have been ignorant of the existence of their aunt, or of her title to any share of the property.

There is no evidence of their being aware of either: that they were so, could only be matter of conjecture; but fraud and dishonesty are not to be assumed upon conjecture, however probable.

But to avoid the effect of the lapse of time, the Plaintiff must establish the existence of conscious injustice by proof. Their Lordships think this has not been done, and, therefore, they will advise Her Majesty to reverse the Decree of the *Sudder Dewanny Adawlut* and affirm the Decree of the Provincial Court, condemning the Respondent in costs, in both the Courts below; but their Lordships are of opinion that each party should bear their own costs of the Appeal to Her Majesty in Council.

THE BANK OF BENGAL - - - *Appellants*,

AND

RADAKISSEN MITTER - - - *Respondent*.*

On Appeal from the Equity Side of the Supreme Court of Bengal.

28th June, 1842.

THIS was an Appeal from a decree in a cause instituted by the Respondent against the Appellants and others, to restrain the Appellants from proceeding to enforce the payment of certain Bills of Exchange drawn by the Respondent on, and accepted by, the firm of *Fergusson* & Co., and discounted on their behalf by the Appellants, the Bank of *Bengal*.

A. drew five Bills in favour of B. on *Fergusson* & Co., who accepted the same, and got them discounted by the Bank of *Bengal*, and on their becoming due procured their renewal. *Fergusson* & Co. subsequently drew three Bills on the Bank of *Bengal*; and, for securing, as well the repayment of the principal sum due on these Bills and interest, as of all and every sum or sums which the Bank had already advanced or should advance on account of the drawers, deposited as collateral securities various quantities of *Chili* copper of a larger amount in value than the advances then made. By a condition in these Bills, the Bank were authorized, in default of payment within the time stipulated, to dispose of the copper by public or private sale, and to reimburse themselves the principal and interest due thereon. Shortly afterwards, *Fergusson* & Co. failed, and Assignees of their estate and effects were appointed under the Indian Insolvent Act. On presentation to A. of the first of the renewed Bills, he served notice on the Bank not to part with the securities so deposited with them, alleging that the Bills drawn and renewed by him, were accommodation bills, for which he had not received any consideration, and were renewed on the faith of the securities being applicable to their discharge. The Assignees of *Fergusson* & Co. redeemed the copper by paying to the Bank the amount of the principal and interest due upon the Bills drawn by *Fergusson* & Co. All the Bills drawn by A. were dishonoured, and the Bank of *Bengal* brought an action against A. for their amount. On a Bill filed by A., the Bank were restrained by Injunction from proceeding with the action at law. Held on Appeal by the

* Present: Lord Brougham, Mr. Baron Parke, Vice-Chancellor Knight Bruce, and The Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*,—Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

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In 1832, the Appellants having agreed to discount Bills to the amount of S. R. 450,000 on account of *Fergusson* & Co., five Bills were drawn by the Respondent, on behalf of that firm, upon one *Durponarain Gangooly*, a *sircar* or manager in their employ, by whom they were indorsed, and accepted by the Appellants.

The Bills were severally made payable three months after date, in accordance with the provisions of section 15 of the Charter of Incorporation of the Bank of *Bengal*, which prohibits the Bank from discounting any negotiable securities that have a longer period to run.

These Bills being, as it was alleged, merely accommodation Bills for the firm of *Fergusson* & Co., and drawn by the Respondent, upon an understanding with them, that he should run no risk on their account, were, with one exception, never paid, but from time to time, and as they became due, were renewed by the Respondent, other Bills being substituted in their stead, the five last of which bore date respectively the 2nd, 6th, and 28th days of *September* 1833, and were collectively for the sum of S. R. 400,000 ; 50,000 having been paid on their account.

Besides the Bills thus drawn and renewed by the Respondent, the Bank of *Bengal* were in possession of three Bills of the same dates drawn by *Fergusson* & Co. in their own names, and accepted by the Appellants,

Judicial Committee, discharging the Injunction and reversing the Decree of the Supreme Court, that, under the circumstances, the redemption of the securities was a sale within the meaning of the condition contained in the deposit Bills, and that such sale was not a release to A. as surety for the previous Bills, the condition not being that the copper or the proceeds thereof should be applied preferentially or *pari passu* with the other debts, but simply in reimbursement to the Bank, of the principal and interest due upon the Bills.

together with a quantity of copper, deposited as collateral security for the payment thereof.

Each of these Bills was similar in form, varying only in the amount and value of the collateral security. The first, dated the 2nd *September* 1833, was as follows:

"Bank of *Bengal*, 2nd *September* 1833.

"Three months after date we promise to pay to "*George Haley*, Treasurer of the Bank of *Bengal*, on "account of the said Bank, the sum of *sicca rupees* "(245,600) two hundred and forty-five thousand and "six hundred, with interest at the rate of four (4) "rupees (4) four per cent. per annum, and for se-"curing the repayment as well of the said principal "sum, and interest, at the rate aforesaid, as of all and "every sum or sums which the said Bank of *Bengal*, "or the Treasurer of the Bank for the time being, or "any other person or persons on account of the said "Bank, have already advanced or paid, or have en-"gaged to advance or pay, or shall or may at any "time or times hereafter advance or pay, or become "engaged to advance or pay to, or on our account, or "to or on account of us, or any or either of our "executors or administrators, or representatives, or "any or either of them together, with interest for the "same sum or sums of money respectively at the rate "of twelve per cent. per annum: we, the said *Fer-*"*gusson* & Co., have deposited in the said Bank, as "collateral security, *Chili* copper, 10,000 *maunds**, at "30 current rupees, valued of *sicca rupees* (327,500) "three hundred and twenty-seven thousand and five

* A measure of weight amounting in *Bengal* to about 80 lbs.—*Hamilton's E. I. Gazetteer.*

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"hundred; and in default of payment at the period "above mentioned, we, the said *Fergusson* & Co, "hereby authorize the Treasurer of the said Bank for "the time being, absolutely to sell or dispose of the "said *Chili* copper for the reimbursement to the said "Bank, as well of the said principal and interest at "the rate aforesaid, as of all and every such other "sum or sums of money, together with interest as "aforesaid, on or before the expiration of the said "period, by public or private sale, the said Treasurer "rendering to us, the said *Fergusson* & Co., any "surplus which may be forthcoming from such sale, "and we being bound to make good to him whatever "deficiency there may be below the amount of the "said principal sum and interest as aforesaid, and the "sale price of the said *Chili* copper to be made on "the price to be calculated at the premium or dis-"count of the *Chili* copper on the day on which the "said *Chili* copper shall be so sold; but if the said "Treasurer shall not proceed to sell or dispose of the "said *Chili* copper at such period, we, the said *Fer-"gusson* & Co., shall and will pay and allow to the "said Bank of *Bengal*, interest at and after the rate of "twelve per cent. per annum on the said sum, and "on all and every such other sums as aforesaid, up to "the day on which the said sum shall be paid off and "liquidated, or up to the day on which the said "Treasurer of the said Bank of *Bengal* shall, in pur-"suance of the power hereinbefore contained, sell and "dispose of the said copper so deposited as aforesaid, "as the case may happen.

(Signed) "FERGUSSON & Co."

Witness, *Radananth Bose.*

The second Bill, which bore date the 6th of *September* 1833, was for the sum of S. R. 73,700, for which eleven slabs of copper weighing 3,000 *maunds* and upwards, of the value of S. R. 98,275, were deposited in like manner as collateral security: and the third Bill, dated the 28th of *September* 1833, was for the sum of S. R. 35,400, for which 560 slabs of copper weighing 1,500 *maunds* and upwards, of the value of S. R. 47,200, were deposited as collateral security.

It was alleged and insisted by the Respondent, that he was induced to execute the renewed Bills of the 2nd, 6th, and 28th of *September* in consequence of the deposits of copper so made by *Fergusson* & Co. with the Bank of *Bengal.*

In the month of *October* 1833, *Fergusson* & Co. received from the Bank of *Bengal* a further loan of S. R. 490,000, the repayment whereof was secured by a Promissory Note, similar in form, for the amount, and a mortgage or pledge of 3,500 *maunds* of indigo, the property of the firm, which was then of the value of S. R. 800,000, or thereabouts.

On the 26th of *November* 1833, *Fergusson* & Co. presented their petition under the Act for the Relief of Insolvent Debtors in the *East Indies*, 9 *Geo.* IV., c. 73, and were adjudged and declared insolvent, and assignees appointed of their estate and effects.

The first of the renewed Bills drawn by the Respondent having become due, and having been dishonoured by the acceptors, the Bank of *Bengal* caused the same to be presented, on the 10th of *December* 1833, to the Respondent for payment, which

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was refused, and on the 27th of the same month the following notice was served by his attorney on his behalf upon the Secretary of the Bank :—

"We are instructed by *Radakissen Mitter*, the drawer of several Notes or Bills, accepted by Messrs. *Fergusson* & Co., and payable to the Bank of *Bengal*, to give notice, that if you part with or pay over to the Assignees of the said late firm of Messrs. *Fergusson* & Co. any security or securities, and sum or sums of money which may be realized upon any such security or securities which the Bank of *Bengal* holds of the said late firm as deposits and pledges for loans made by the said Bank to the said late firm on the said several Notes or Bills, you and the Bank of *Bengal* will be held responsible for the same to our client, as our client derived no benefit from the said Notes and Bills, and became a party to them upon the express understanding that the whole of the said several securities, so deposited and pledged by the said late firm with the said Bank, were ample for the payment of the said Notes and Bills, and were in the first instance to go towards liquidation thereof."

On the 10th of *February* 1834, *Durponarain Gangooly*, who was the indorser of each of the Bills drawn by the Respondent, obtained (at the instance, as it appeared, of the Assignees of *Fergusson* & Co.) from the Appellants a loan of S. R. 300,000, upon the pledge and deposit of negotiable Paper of the East India Company to the amount of S. R. 318,200. This loan was secured by the Promissory Note of *Gangooly*, in the same form as those previously drawn by *Fergusson* & Co.

Early in the same month, the Assignees applied to the Appellants to redeem the several parcels of copper held by them as collateral security for the Bills drawn by *Fergusson* & Co. in *September* 1833; and after a short delay, for the purpose, as was stated by the Appellants, of ascertaining whether such deposits were applicable for the general liabilities of the Insolvent firm, and also the amount for which the copper could be sold, they permitted such redemption, and delivered up the whole of the copper so deposited to the Assignees upon payment of the sum of S. R. 366,109, and a fraction, being the total amount of principal and interest then due to the Appellants upon the loans made upon such specific deposits.

On the 22nd of *February* 1834, before the last mentioned Promissory Note of the 10th of *February* 1834 became due, the assignees of *Fergusson* & Co. applied to the Appellants to redeem the Company's Paper deposited by *Durponarain Gangooly*, alleging such Paper to have been part of the assets of *Fergusson* & Co., and consequently vested in them, and that *Gangooly* acted in the matter merely as their agent, and was himself a person of no property or substance. The Appellants upon these representations permitted the redemption by the Assignees, and delivered over the Company's Paper on the receipt of S. R. 300,000, with interest; and in the following month the Appellants permitted the Assignees of *Fergusson* & Co. to redeem the *maunds* of indigo, upon payment by them of the sum due on the Promissory Note of *October* 1833.

At the time of the failure of the firm of *Fergusson* & Co., there was one share in the Bank of *Bengal* held by that firm, but registered in the name of *William*

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Frederick Fergusson, as the proprietor thereof, and which was then of the value of S. R. 16,000, or thereabouts. After the failure of the firm, the Appellants, according to the provision of the Act for incorporating the Bank, No. VI. of 1839, s. 39, and the proviso in the 21st section of the Charter, appropriated and transferred the dividends on the same share, amounting altogether to S. R. 600, towards and in part payment of the first of the five discounted Bills drawn by the Respondent, in the hands of the Appellants at the time of such failure, and in further reduction of the liability of the Respondent thereon. On the 12th of *August* 1833, the Appellants commenced an action of *assumpsit* on the plea side of the Supreme Court against the Respondent, for the purpose of recovering the balance due on the five Bills drawn by him and discounted by the Bank as above stated.

In consequence of these proceedings, the Respondent, on the 8th of *November* 1834, filed a Bill in the Equity side of the Court against the Appellants, their Secretary, and the Assignees of *Fergusson* & Co. The Bill set forth the circumstances above stated, and insisted that the terms on which the Respondent consented to become the drawer of the Bills in question were well known to the Appellants; the Complainant also insisted that the Appellants were bound to proceed in the first instance against the Assignees of the Insolvent Estate; that the several collateral securities held by the Bank were liable as well for the debts due from the firm previous to their deposit, as for those incurred at the time; and that the Appellants, by permitting the redemption of the same after the notice served on them on behalf of the Respondent, and without his assent, had relieved him from all liability in respect of the

several Bills of Exchange, or at least to the extent of any surplus value thereof, beyond the amount for which the same were specifically pledged and deposited, and prayed that the Appellants and the Assignees, and all persons claiming under them, might be perpetually restrained from taking any further proceedings against the Respondent to enforce payment of the said five Bills whereon such action had been brought.

The Appellants by their Answer admitted the fact of the transactions set forth in the Bill, and stated the several Bills drawn by the Respondent to have been successively indorsed to and discounted by the Appellants in the ordinary course of their business, and denied that the same had been drawn or recovered by the Respondent on any such assurance or representation of the firm of *Fergusson* & Co., or of the Appellants, as alleged by him, or upon the faith and credit of the several deposits and pledges of copper and indigo, which they insisted were only liable for the sums for which they had been respectively deposited, and for which they had been redeemed by the Assignees: and they denied the several grounds of equitable relief claimed by the Respondent, and insisted on their right to proceed with their action at law for the recovery of the balance due on the several Promissory Notes.

The Assignees also put in their Answer, in which they admitted the facts as generally stated by the Bill, and also that subsequent to the redemption of the copper, they had sold the same at a profit, but contended that the rise in the value thereof was accidental and unexpected, and that at the time of redemption, the sum for which the same was redeemed was the full value. The Defendant, the Secretary of the

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Bank of *Bengal*, also put in his Answer to the Respondent's Bill.

The cause being at issue, witnesses were examined, and the same came on for hearing on the 13th of July 1838, before Sir *Edward Ryan*, Chief Justice of the Supreme Court, and Sir *Peter Grant*, who at the time were the only two Judges of the Court; when it was ordered (Mr. Justice *Grant* dissenting) that the Respondent's Bill should be dismissed with costs.

The Respondent being dissatisfied with this Decree, presented his Petition for, and obtained, a re-hearing of the cause on the 30th of *November* 1838, before the Judges by whom it was originally heard, and Sir *Henry William Seton*, who had been appointed one of the Judges of the Court since the former hearing.

On the 31st of *January* 1839, the Judges gave Judgment, when Mr. Justice *Seton* was of opinion that the injunction prayed for should be perpetual, in which Mr. Justice *Grant* concurred; but the Chief Justice adhered to his former opinion, that the Bill should be dismissed with costs. The decree, therefore, was, that the injunction to restrain proceedings at law should be made perpetual, each party paying his own costs, except the Defendant, the Secretary of the Bank, whose costs the Respondent was directed to pay.

From this Decree the Appellants appealed to Her Majesty in Council.

Mr. *Griffith Richards*, Q. C., and Mr. *Greenwood*, for the Appellants, The Bank of Bengal.

The allegation that the Bills drawn by the Respondent were mere accommodation Bills, and were drawn upon the understanding with *Fergusson* & Co. that

the Respondent was not to be held liable for their amount, is unfounded in fact, and unsupported by evidence. The averment is expressly denied by the Appellants' answer, and no proof is tendered by the Respondent to support such allegation. It was said indeed in the Court below that the circumstance of *Fergusson* himself being a Director of the Bank, and a registered holder of Company's Paper, affected the Appellants with notice of the agreement between him and the Respondent; but if there were evidence of such an agreement, it could not affect the Appellant, since notice to one of the members of a corporation in his private character, and as a partner of a firm not members of the corporation, could not be held notice to the corporate body, who must necessarily all be strangers to the private affairs of their individual members. Were such the law, there would be no limit to the liabilities of a corporation.

Again, it was argued in the Court below, that the Respondent was a surety, and on the ground of his having been released as such by the conduct of the Appellants, the Judgment on the re-hearing proceeded. But in what did his suretyship consist? He is the original drawer of the notes. Now at the time of their being drawn, no security was given by *Fergusson* & Co. to the Appellants, nor were any securities ever given by *Fergusson* & Co. for the amount of the Respondent's Bills. It is alleged by the pleadings, that the copper and indigo deposited by *Fergusson* & Co. with the Appellants, was for all sums due from the former, and that the Appellants had a general lien on the same, beyond the amount for which the deposits were respectively made. But the terms on which the deposits were made are explicit; they are redeemable for the

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several amounts specified: the Assignees had, therefore, a right to redeem the same on payment of each specific sum and interest. *The Bank of Bengal* v. *Young* (*a*). The debt contracted by the Bills was on the personal security of the Respondent, and the nature of the contract does not imply that he ever contemplated being held merely a surety. *Wright* v. *Simpson* (*b*). There was no dealing with the original Bills, or those renewed in their place, which could release the Respondent as the drawer: the only claim for such release is founded on the deposit Bills; there is no evidence of the agreement stated by the Respondent. The dishonour of the original Bills drawn by the Respondent, and the demand made on him for payment, was notice to him, that the Appellants held him liable; he was also cognizant of the deposit Bills, and the securities pledged therewith; this he stated himself. Now in order to entitle him to their benefit, he ought to have paid the debt and required the transfer of them to himself; the notice given on his behalf was not to part with the deposits, but they were pledged for specific sums, redeemable on their liquidation, and if the surety desired to have the benefit of them, he ought to have paid the principal due on them, and then taken an assignment; that is the only ground on which he could claim equitable relief: the payment of the debt, or the placing himself in the situation of the principal debtor; that is the principle of all the decisions. *Law* v. *East India Company* (*c*), *Boultbee* v. *Stubbs* (*d*), *Mayhew* v. *Crickett* (*e*). In *Wade* v. *Coope* (*f*), the

(*a*) 2 Moore's Ind. App. Cases, 87.
(*b*) 6 Ves. 714-26.
(*c*) 4 Ves. 824.
(*d*) 18 Ves. 20.
(*e*) 2 Swan. 185.
(*f*) 2 Sim. 155, 160.

Vice-Chancellor, stating the law, says, "The doctrine is, that where a man becomes surety for a debtor for the payment of a debt, he has, if he pays the debt, a right to avail himself of all the securities which the creditor has. But that doctrine never applies to a person who becomes surety at one time, and a security is given to the same creditor, either for another debt, or, what is the same, for a distinct portion of the debt for which the first security was given:" and he continues, "I have not found any such case: on the contrary, all the notion I have of the law is, that the doctrine has always been stinted to the particular contingency of the debt being one, and the surety being given for the same debt, at the time when the person became surety for it." *Brown* v. *Carr* (*a*), *Spears* v. *Hartly* (*b*). Without payment of the debt, therefore, the Respondent had no right to the deposits, and the redemption by the Assignees for their market value was according to the terms upon which they were made, and in no way prejudicial to the Respondent.

The Attorney-General (Sir *F. Pollock*), Mr. *Bethell*, Q. C., and Mr. *T. B. May*, for the Respondent.

That the Bills originally drawn by the Respondent were accommodation Bills, there can be no doubt. They were accepted by *Fergusson* & Co., and the renewed Bills were in all respects similar to those drawn in the first instance. It is not pretended that the Respondent ever derived any benefit from them. This circumstance is sufficient evidence of the agreement that he should be held harmless. The Respondent was

(*a*) 2 Russ. 600. (*b*) 3 Esp. 81.

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to all intents and purposes a surety. What then is the contract made with his principal, by the deposit Bills? The deposits are stated to be made for security as well of the principal sums and interest thereby secured, "as of all and every sum or sums which the said Bank of *Bengal*, or any other person or persons, on account of the said Bank, have already advanced or paid, or have engaged to advance or pay, or shall at any time hereafter advance or pay to or on our account, or of our executors, &c." That this contract was made with the privity of the Respondent, the notice served by him on the Bank of *Bengal* shows; but notwithstanding such notice and the term of the contract, the Appellants permit the Assignees to obtain possession of the deposits on payment of the principal and interest due upon *Fergusson* & Co.'s Bills, thereby giving up securities pledged for all sums which the Bank had already advanced. It is said that the surety is only intitled to the benefit of securities deposited by the principal upon payment to the creditor; but the authorities cited do not bear out that position. The true principle is, that the creditor is a trustee for the surety, not merely from the fact of payment, but from the relation that subsists between them; and consequently, whether the surety has paid or not, the creditor can do no act to his prejudice. This is the doctrine established in *Mayhew* v. *Crickett* (*a*), and the authorities there cited. In that case the surety sought his discharge through the medium of the same equity as is contended for here; and it appears from what fell from Lord *Eldon*, that, but for a subsequent promise, he would have been held discharged both at Law

(*a*) 2 Swan. 185.

and in Equity. The case of *Browne* v. *Carr* (*a*) rested on peculiar circumstances: the surety disputed his liability at law; he had been guilty of laches in not availing himself of his legal remedies, and there were other grounds peculiar to the nature of the certificate, which took the case out of the general principle. In *Boultbee* v. *Stubbs* (*b*), cited on the other side, Lord *Eldon* expressly lays it down, that the creditor agreeing with the principal debtor to postpone his remedy, the effect is, that in equity the right against the surety is gone. It is in vain to say the indulgence may be for the benefit of the surety: another person has no right to judge what are the surety's remedies; and the original implied contract being, as far as the nature of the original security will admit, that the surety paying the debt shall stand in the place of the creditor. No payment here by the Respondent could have placed him in the situation of the creditor; for the deposits were redeemed, not at a price ascertained by public sale, but at the sum for which the deposit notes were drawn.

Suppose, however, such sum to have been the market value of the copper at the time of such transfer, the securities were for advances made prior to as well as at the time of their deposit; the Bank of *Bengal* ought therefore, at least, to have applied their proceeds, *pari passu*, to the discharge of the Respondent's Bills, as well as those of *Fergusson* & Co.; they did so with respect to the indigo and Company's Paper, which showed they were cognizant of the Respondent's equity. It is upon these principles that the Respondent was held entitled to the relief he sought by his Bill

(*a*) 2 Russ. 600. S. C. 7 Bingh. 508. (*b*) 18 Ves. 20. 21.

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in the Court below, and we submit that this Appeal must be dismissed with costs.

The Right Hon. Dr. LUSHINGTON:

This is an Appeal from the Supreme Court of Judicature at *Fort William*, and was brought under the following circumstances.

In the year 1832, *Radakissen Mitter* drew several Bills in favour of *Durponarain Gangooly* on Messrs. *Fergusson* & Co., Merchants in *Calcutta*, who accepted the same. Those Bills being indorsed by *Durponarain Gangooly*, were discounted by the Bank of *Bengal*, and the value was paid to *Fergusson* & Co. The whole amount for which those Bills were originally given was S. R. 450,000. Those Bills were renewed from time to time, and, save a sum of S. R. 50,000, no money was paid in discharge of them.

In the month of *November* 1833, *Fergusson* & Co. failed. At that time the Bank of *Bengal* held five renewed Bills for S. R. 400,000, which became due and payable in *December* 1833, and *January* 1834.

On the 2nd of *September* 1833, the Bank advanced to Messrs. *Fergusson* & Co. the sum of S. R. 245,600, on a deposit, as a collateral security, of 10,000 *maunds* of *Chili* copper, valued at S. R. 327,500. The terms upon which this copper was deposited will require to be more particularly noticed.

On the 6th of *September* 1833, a further advance was made by the Bank to *Radakissen Mitter* of S. R. 73,700, on the security of 1,100 slabs of copper, valued at S. R. 98,275. This copper was deposited as a security upon precisely the same terms, with respect to *Radakissen Mitter*, as the copper deposited on the 2nd of *September* was with respect to *Fergusson* & Co., and the advance was for the benefit of *Fergusson* & Co.

On the 28th of *September* 1833, a further advance of S. R. 35,400 was made to Messrs. *Fergusson* & Co. by the Bank, on the deposit of 568 slabs of copper, valued at S. R. 47,200, and such deposit was made in the same terms as that on the 2nd of *September*.

On the 26th of *November* 1833, Messrs. *Fergusson* presented their Petition to the Court for the Relief of Insolvent Debtors, and Assignees were appointed of their estate and effects. The first of the Bills drawn by *Radakissen Mitter* became due on the 10th of *December* 1833, and was presented to him for payment.

On the 27th of *December* 1833, *Radakissen Mitter* caused a notice to be served on the Bank to the following purport, that if the Bank should part with or pay over to the Assignees of *Fergusson* & Co. any securities or proceeds of securities held by the Bank for loans made to *Fergusson* & Co. on the Bills of Exchange drawn by *Radakissen Mitter*, the Bank would be held responsible, as *Radakissen Mitter* had derived no benefit from the Bills, and had become a party to them on the express understanding that the securities were ample, and should be applied in the first instance to the liquidation of the Bills.

On the 12th of *February* 1834, the Bank, upon the application of the Assignees, delivered up the three parcels of copper so deposited with them, upon payment by the Assignees of S. R. 366,109, being the amount of the principal and interest of the three sums advanced upon the security of the copper.

On the 12th of *August* 1834, the Bank brought their action against the Respondent, as drawer of the five Bills, for the balance due to the Bank, viz. the amount of the Bills, less the dividends, on a share in the said Bank, which had been held by *Fergusson*

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on behalf of his partnership, and less also S. R. 99,552. 1 a. 2 p., received on account of an order addressed in *September* 1833, to the Government Loan Committee by Messrs. *Fergusson*, and accepted by such Committee. This order required the Loan Committee to pay to the Bank of *Bengal* S. R. 130,000 from proceeds of indigo pledged to the Committee; and the Bank were to hold this money as a security for the five Bills, and also for a Bill drawn by Mr. *Colville*, accepted by Messrs. *Fergusson*, and discounted by the Bank.

In *November* 1834, the Respondent filed his Bill on the Equity side of the Supreme Court against the Bank and the Assignees of *Fergusson* & Co., and prayed a perpetual Injunction against any further proceedings at law to enforce payment of the said five Bills. An Injunction till further order was obtained on the 9th of *February* 1835.

The Defendants to the Bill having appeared, and the cause gone through the ordinary stages, it was heard on the 13th of *July* 1838, before the Chief Justice and one of the Puisne Judges, there not being any other at that time in *Calcutta*. The Court was divided in opinion, and in such case the opinion of the Chief Justice being entitled to prevail, a Decree on the 13th of *August* was made conformable to his opinion, and the Bill was dismissed with costs as against the Bank of *Bengal*.

A Petition for rehearing having been presented, the cause was reheard on the 30th of *November* before the Chief Justice, Sir *John Peter Grant* and Sir *Henry W. Seton*, who, in the interval, had arrived in *Bengal*, and taken his seat.

By the Decree on the hearing, dated the 31st of *January* 1839, the Decree of the 1st of *August* was

reversed, and the Injunction made perpetual; and the Bank was left to pay its own costs. From this Decree the Chief Justice dissented, and the Bank of *Bengal* brought the present Appeal.

In these proceedings there are very many other circumstances set forth; but as their Lordships are of opinion that their decision must be chiefly governed by the view they take of one question, this short summary may suffice to bring out so much of the case as they deem necessary.

It is perfectly clear that the Respondent, by drawing these Bills of Exchange, undertook, if the acceptors failed to pay, to make payment himself. Of the averment contained in the Bill, that the Respondent, by an understanding with the Bank, was to be relieved from all responsibility on account of his being the drawer of the Bills, there is no proof whatever; and, therefore, any inference arising from such fact, if true, must be wholly dismissed from the case. At the time the Bills were originally drawn, it does not appear that the Bank held any security from Messrs. *Fergusson*, and therefore the engagement entered into by the Respondent to pay the amount of the Bills, if the acceptors did not, was wholly unconnected with any question of security. At a period, however, long subsequent to the drawing the first Bills, the Bank did take certain securities; and it is on account of the manner in which the Bank dealt with those securities that the Respondent claims to be relieved from his liability to pay those Bills.

It will be necessary presently to advert to the terms of the documents whereby those securities were acquired, and afterwards the mode in which the Bank dealt with them.

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It is unnecessary to consider how far the Respondent obtained a right to the securities subsequently acquired,—securities neither given nor agreed to be given till a long time after the first Bills became due,—and whether he could acquire such securities without paying the debt. This may or it may not be, as far as the present question is concerned, because, assuming the affirmative of the proposition, the securities were, we think, justly dealt with.

Supposing the Respondent to have acquired a right to the benefit of the security, what was the extent of that right? We apprehend that the Respondent could in any view only take a right to the benefit of the security subject to the power which the creditor by the terms of the security was entitled to exercise. And this condition is no injustice to the surety, for whatever be the quantum of benefit he derives from the security, it is a benefit beyond that which he stipulated for when he originally became surety.

This security is given by a document to the following effect, in the form of a Promissory Note signed by *Fergusson* & Co., dated 2nd *September* 1833. That firm, three months after date, promise to pay the Bank of *Bengal* S. R. 245,600, with interest as stated; and the document states, that they have deposited in the Bank, as a collateral security, *Chili* copper valued at S. R. 327,500; "and in default of payment at the period above mentioned, we, *Fergusson* & Co., hereby authorize the Treasurer of the Bank for the time being, absolutely to sell and dispose of the said *Chili* copper, for the reimbursement to the said Bank, as well of the said principal and interest at the rate aforesaid, as of all and every such other sum or sums of money, together with interest, as aforesaid, on or after the

expiration of the said period, by public or private sale."

There were two other parcels of copper deposited in *September* by documents similar in effect.

There is no apparent difficulty in the construction of this Instrument; it is simply an obligation to repay a certain sum then advanced by the Bank, and the deposit of a certain quantity of copper to secure the payment of that debt and all other sums of money which might be then due, or might be advanced in the interval. The Instrument did not direct that the copper or the proceeds thereof should be applied preferentially in payment of any particular debt.

Such being the Instrument by which the security was given, the next consideration is, how did the Bank of *Bengal* deal with the security?

On the 26th of *November* 1833, *Fergusson* & Co. became Insolvent, and the Bills drawn by the Respondent became due in *December* and *January* following. On the 27th of *December* 1833, the Respondent gave notice to the Bank to retain the securities, claiming a right to have them first applied in payment of the Bills. The Bank retained the copper till the 12th of *February* 1834, when they delivered it over to the Assignees of *Fergusson* & Co., on the payment of S. R. 366,000, which was the amount, with interest, of the special loans made by the Bank at the times of receiving the three parcels of copper.

The Respondent says that this copper was not sold, but was redeemed contrary to the terms of the Instrument, and that too at less than its real value; and that, therefore, the security to which he has a claim has been diminished in value, and that the conduct of the creditor has relieved him from his obligation as surety.

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We are of opinion, that returning the copper to the Assignees on payment of its full value (assuming that fact for the present) is a disposition of it fairly within the terms of the Instrument, which gives to the Bank the right to sell or dispose of the copper by public or private sale. Such a disposition of the copper is a sale of it in all essential particulars. The Assignees are purchasers for a full consideration, and the Respondent, by this mode of dealing with the copper, does not suffer the slightest injury, nor are any of his rights infringed.

That the copper was sold for less than its value, there is no evidence whatever. The answer of the Bank was read, which distinctly states the contrary; nor is there any probability of the security being so sacrificed, for it was clearly the interest of the Bank to obtain the full value of it. It is true, indeed, that the copper was afterwards sold by the Assignees for a larger amount; but such sales took place at distant periods, and when the market had altered. On this ground we are of opinion that the Respondent is not entitled to relief.

It has, however, been further contended, that the Bank, having received the value of the copper, was bound to have applied it *pari passu* towards the liquidation of all the debts due from *Fergusson* & Co. to the Bank, including the five Bills. But we think that the Instrument creating the security, not directing it to be applied preferentially in payment of any debt, nor *pari passu* in payment of all debts, and the Assignees of *Fergusson* & Co. not requiring it to be appropriated in liquidation of any demand, the Bank had a perfect right to apply it towards the payment of the special loans. We think so upon the ordinary prin-

ciple which entitles a creditor, in the absence of any direction from the debtor paying, to apply the monies he receives to whichever of several debts arising he pleases. But it may be well to consider what would be the result if the proposition of the Respondent was true; it would be this, that the Respondent would be relieved *pro tanto* by the *pari passu* application of the produce of this security acquired after he became surety; and in the same proportion the Bank would be left without security for payment of a loan advanced by them long after the Bills were discounted, and on the faith of this very security. The Bank would to this extent be deprived, as to the Bills, of the benefit of the security they originally possessed. It is difficult to find any principle of Law or Equity which could support a proposition fraught with such consequences.

With respect to the share which *Fergusson* himself held in the Bank, the dividends were applied in liquidation of these Bills—the share became the property of the Assignees. We see no reason to conclude that it was illegally dealt with, to the prejudice of the Respondent.

Their Lordships, therefore, are of opinion that the Decree appealed from must be reversed, and the Bill dismissed, but without costs; thus leaving each party to pay their own costs.

It is right that I should add, that upon the present occasion, His Honour the Vice-Chancellor entertains some doubt with respect to this Judgment, and thinks that it would perhaps be more expedient that further inquiry should be instituted into the circumstances.

Decree reversed.

MAHA-RAJAH MITTERJEET SING, for himself, and as Guardian of RAJAH MOOD NARAIN SING, MEER ABDOOLLAH, and LALA BUNWAREE LAL, } *Appellants,*

AND

THE HEIRS OF THE LATE RANEE, widow of RAJAH JUSWUNT SING } *Respondents.**

On Appeal from the Sudder Dewanny Court of Bengal.

7th, 11th, and 17th Dec. 1841.

A *talook* consisting of 210 villages, but classed under the decennial settlement, for fiscal purposes, as 74 villages, and assessed at 74 separate *sudder jummas*, was sold by public auction by the Collector, in one lot, for arrears of Government revenue, at a sum greatly disproportionate to its value. The sale was made by order of the Board of Revenue, but it did not appear that the Collector had informed the Board that the *talook* consisted of 74 villages, or that the Board had authorized the sale in one specific lot. The Board subsequently confirmed the sale. The surplus of the purchase-money, after satisfying the Government arrears, was received and appropriated by the *malguzar*. On a suit by the *malguzar* against the purchasers, to annul the sale, it was held by the Judicial Committee affirming the Decree of the Court below :—

I. That the act of the Collector in putting up for sale and consolidating the 74 villages as one lot, without the express authority of the Board of Revenue for the sale of such specific lot, was contrary to the Regulations, and illegal, and was not cured by the general authority given previous to the sale, or by the subsequent confirmation thereof by the Board.

II. That the sale being unauthorized, no implied adoption by the subsequent appropriation of the purchase-money could bar the *malguzar* from reclaiming the estate, on the restoration of the purchase-money.

III. That the retrospective operations of Reg. XI. 1822 did not apply

THIS was an Appeal from a Decree of the *Sudder Dewanny Adawlut* of *Bengal*, of the 29th of *May* 1832, affirming a previous decision of the Provincial

* Present : Members of the *Judicial Committee*,—The Lord President, Lord Brougham, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*,—The Right Hon. Sir E. Hyde East, and The Right Hon. Sir A. Johnston.

Court of *Patna*, of the 19th of *November* 1825, whereby the sale of the *talook Belkhuruh*, in the *pergunna Urol*, was annulled; and the Appellants, who were the purchasers, or had become co-sharers in the *talook*, were decreed to deliver up possession to the Respondents.

The sale was made by order of the Board of Revenue, to satisfy arrears of revenue due to the Government from the late *Ranee*, the widow of *Rajah Juswunt Sing*, deceased, the former proprietor and *zemindar*.

The *talook Belkhuruh* consisted of 85 original (*aslee*) villages, and 125 hamlets or dependencies (*dakhilee*), amounting together to 210 villages and hamlets, each of these being rated in the Collector's books at a separate *jumma*, or revenue, to the amount in the whole of S. R. 24,748. 11 a. 10 g.

At the decennial settlement in 1197 *Fusly*, (1789-90 A.D.,) the amount of revenue payable to Government by *Rajah Juswunt Sing*, in respect of the villages and hamlets comprised in the above *talook*, (which was for fiscal purposes subdivided into 76 territorial divisions,) at separate *jummas*, amounted in the whole to S. R. 25,134. 4 a. 5 g. Accordingly, *Juswunt Sing*, with

to a sale so circumstanced as this; it being provided by clause 3, of sec. 6, that in order to prevent the sale being annulled, the Board of Revenue shall have actually given authority to proceed to the sale of the specific lot.

But the Courts in *India* having proceeded on the footing that the purchaser had been repaid, during the time he was in possession, by the perception of the rents and profits of the *zemindary*, did not direct the *malguzar* to refund the purchase-money, or call for an account of the mesne profits. Such part of the Decree of the Court below reversed, and an account directed to be taken in *India* of the rents and profits received by the purchaser, giving credit for permanent improvements on the estate; and as the purchasers were not responsible for the illegality of the sale, so much of the Decree of both Courts below, as condemned them in costs, reversed, and both parties ordered to pay their own costs in the Courts in *India* and in this country.

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a view to the decennial settlement, presented 76 separate *durkhasts*, or petitions, with a statement of the *jumma* and lands separately comprising the above villages and hamlets. According to these petitions, the *jumma* and area of the villages and dependencies were entered in the book of settlement of the Collector for the years 1197, 1198, 1199, *Fusly*, the *jumma* of each village being separately fixed and entered in the book of settlement.

Two of these separate divisions, assessed at S. R. 385. 9 a., were transferred by *Rajah Juswunt Sing*, during his lifetime, leaving 74 divisions at an annual *jumma* of S. R. 24,748. 11 a. 10 g.

In the year 1800 or 1801, the Collector of *Bahar* suggested to Government, with a view to the more convenient and certain realization of the revenue, that in lieu of taking several *kabooliats*, or agreements, for the payment of revenue, from one *zemindar*, in respect of the several portions of land comprising his *zemindary*, one general *kabooliat* only should be taken from each *zemindar* for all the land in respect of which he was assessed to Government. The suggestion was approved by the Government, and the Collector was directed to carry the plan into effect.

Accordingly, *perwannas* (warrants or orders) were immediately issued from the Collector's office in *zillah Bahar*, notifying the intention of Government to the several *zemindars*, and, amongst others, to *Rajah Juswunt Sing*.

Before the *perwanna* of the Collector could be acted upon by the *Rajah*, he died; leaving the *Ranee* his widow, who succeeded to his estate, and entered into possession of his *zemindary*.

On the 6th of *March* 1801, the *Ranee* entered into

an agreement with the Government to pay the *malguzary jumma* (assessed revenue) of the aforesaid *pergunnas*, and at the same time appointed *Baboo Puhulwan Sing* her agent, authorizing him to receive the collections, and to pay the Government dues, and generally to conduct and carry on the business relating thereto.

On the 23rd of *June* 1801, the Board of Revenue addressed a letter to the Collector of *Bahar*, approving of his issuing a publication notifying that the several adjoining villages composing a *zemindary*, were to be considered as one joint estate; and accordingly a notification to that effect was issued on the 9th of *July* 1801; in pursuance of which *Puhulwan Sing* executed on behalf of the *Ranee* an agreement with Government, dated the 24th *October* 1801, whereby he agreed to pay the annual sum of 41,451 rupees, 4 anas, the *jumma khiraj*, or assessment of the villages of the *pergunnas* of *Urol* (comprising the *talook* of *Belkhuruh*), and *Mussoora* (comprising the *talook* of *Ikhtiyarpoor Chuk Nundam*), *Shahpoor Mittur*, *Sanda* and *Goh*, (excluding certain charity lands,) therein mentioned, (that being the annual *jumma* fixed at the decennial settlement, and which had been confirmed,) from the beginning of *Fusly* year 1207 (A.D. 1799-1800), as the yearly *jumma* for the villages of the *pergunna*. To this document was appended a list of the villages in each *pergunna*, amounting in the whole to 147, with their separate assessment.

In the *Fusly* year 1222 (1814-15), in consequence, as was alleged, of the want of rain, the crops entirely failed. The *Ranee*, therefore, on the 14th *January* 1815, presented a petition to the Government, setting forth these facts, and stating her inability to meet the

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Government claims, and praying for delay in payment of one-half of the *jumma* for three years without interest. On the 2nd of *March* 1815 the *Ranee* presented a second petition to the like effect, but no orders were passed. Notwithstanding that these petitions were still unanswered, the Collector of *Bahar* caused an advertisement to be published, dated the 2nd of *May*, which was in the following form :—

"As the villages of the *pergunnas* of *zillah Bahar* "will be sold at *Bankipoor*, at the *Sudder cutcherry* "(office of the Collector) of *zillah Bahar*, by auction, "according to the annexed statement, for the balances "due to Government to the end of the *kist* of *Pha-* "*goon* 1222 *Fusly*, by the orders of the Board of "Revenue, dated the 1815, on the "5th of *June* 1815, agreeing with the 13th of *Jeyt* "1222 *Fusly*, on *Monday*; and after which, on other "dates, until all the villages included in the advertise- "ment be sold,—notice is hereby given, that whoever "may wish to purchase the villages in the annexed "statement, do attend at the date and day appointed "at the said *cutcherry*, and purchase. The conditions "of the sale are, that fifteen per cent. of the purchase- "money be deposited immediately as earnest, and the "balance be paid into the Treasury in eight days; and "if the purchaser do not pay the balance of the price "in the said time, he shall forfeit the said deposit, and "the villages purchased will be re-sold; and if any "loss accrue by the re-sale, the first purchaser shall "pay it; and if any gain, it shall go to the former "*malguzar*.*

* The person paying the land revenue to Government, whether the owner, cultivator, or *zemindar*.

"Name of *mahal* . .	*Belkhuruh.*
"Name of *malguzar* .	The *Ranee* of the late *Rajah Juswunt Sing.*
"*Sudder jumma* . .	24,748 *rupees*, 11½ *anas.*
"Name of *pergunna* .	*Urol.*
"Villages to be sold .	*Belkhuruh*, &c., seventy-four villages.
"Balance of Government	12,742 *rupees*, 10 *anas*, 5 *gundas.*"

It appeared that the above balance, or that part of the above balance which remained due at the time of sale, was due in respect of the *talook Ikhtiyarpoor Chuk Nundam*, situate in the *pergunna* of *Mussoora*, and not for any of the villages in *Belkhuruh*, in the *pergunna Urol.*

On the day appointed for the sale, the same was postponed; and, on the 5th of *June*, a second advertisement was issued, in the following form :—

"Formerly advertisements of the 2nd of *May* 1815 "were published, that the villages of the *pergunnas* "of *zillah Bahar*, mentioned in the said advertise- "ments, would be sold on *Monday*, the 5th of *June* "1815, agreeing with the 13th of *Jeyt* 1222 *Fusly*, "for the arrears of the *malguzary* due to Government, "but that the sale would be suspended from that date "to 21st of *June* 1815, according to the orders of the "Board of Revenue; and that on *Thursday*, the 22nd "*June* 1815, agreeing with the 1st of *Asarh* 1222 *Fusly*, "the sale of the villages, mentioned in the said ad- "vertisements, would take place at *Bankipoor* upon "the conditions stated in them,—notice is therefore "given, that purchasers attend on the 22nd of *June* of "the said year at *Sudder cutcherry* at *Bankipoor*, and, "if the sale of the villages take place for arrears, that

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"they purchase on the conditions stated in the former "advertisements."

Neither the names of the villages, the extent of the lands, the amount of arrears, or the name of the *malguzar*, as required by Reg. XVIII. 1814,* were stated in this advertisement; nor was it published at any of the villages advertised for sale; nor was any notice thereof or any copy given to or served upon the *Ranee;* but it was forwarded and suspended in the Courts at *Patna*, in the *Zillah* Court of *Bahar*, and in the *Zillah* Court of *Ramgar*: and the *Ranee* was alleged to have had notice thereof through one *Chuman Lal*, her agent, who was present at the *cutcherry* (or office of the collector) on the day in question.

On the day this second advertisement was issued, the *Ranee* paid into the Collector's office the sum of R. 6,297. 4 a., on account of the arrears; and, on the 19th of the same month, the further sum of R. 3,673, amounting together to the sum of R. 10,026, 4 a., leaving a balance only of R. 2,716. 6 a. 5 g. due on account of the arrears mentioned in the original advertisement of the 2nd of *March* 1815.

Notwithstanding these circumstances, the Collector proceeded, on the 22nd of *June*, to the sale of the whole of the property advertised, and inserted a *rubakary* (or registry) of the sale in the records of his office, to the following effect: "The *talook* of *Belkhuruh*, *pergunna* of *Urol*, at the *sudder jumma malguzary* of twenty-four thousand seven hundred and forty-eight *rupees*, eleven *anas* and a half, has been sold for the arrears of *malguzary* due to Government. *Hurdial Sing*, the agent of *Maha-rajah Mitterjeet Sing*, *Bahadur*, bought it for one *lac* and ten thousand *rupees*."

* Rescinded by clause 1, sec. 2. Reg. XI. 1832.

It appeared from the evidence in the cause, that the sale was taken out of its turn, and that, at the time of the sale, the *talook* was worth nine or ten *lacs* of *rupees*.

On the 25th of *June*, the *Ranee* presented a petition to the Judge of *zillah Bahar*, complaining of the irregularity of the sale, and praying that the same might be annulled. She also presented another petition to the acting Collector, alleging collusion by *Maha-rajah Mitterjeet Sing*, and other persons, and requesting, among other things, that these petitions might be transmitted to the Board of Revenue, with the statement of the sale.

On the 29th of *June* 1815, the *Maha-rajah*, the only person who, at the time of sale, was declared to be the purchaser, presented the following petition to the Collector of *Bahar* :—

"The whole of the *talook* of *Belkhuruh*, *pergunna Urol*, *aslee* and *dakhilee*, the property of the *Ranee* of the late *Rajah Juswunt Sing*, the *malguzary jumma* of which is twenty-four thousand seven hundred and forty-eight *rupees*, eleven *anas*, ten *gundas*, was sold on the 22nd of *June* 1815, for the arrears due to Government; your petitioner bought it through *Hurdial Sing*, his agent, for *Baboo Mood Nàrain*, his successor (and youngest son), a minor, and *Meer Abd-Oollah* and *Gokul Chund*, at the price of one *lac* and ten thousand *rupees*, which was paid in full on the 28th of the same month, into the public treasury; and the shares of the aforesaid persons have also been received. It was necessary to inform you of this, that orders may be given to have the names of *Baboo Mood Narain Sing*, *Meer Abd-Oollah*, and *Gokul Chund*, inserted under the head of purchasers at the sale; and a deed of sale, and *perwanna*, and *amil-dastak*, be granted in

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their names, according to the annexed statement: 210 villages (85 *aslee*, 125 *dakhilee*), according to the sale-price."

The Collector, on the same day, made an order on this petition, declaring that, when the sale had been confirmed by the *Sudder*, the names of the several sharers therein mentioned would be inserted in the office.

In pursuance of the order made by the Collector on her former petition, the *Ranee* presented three further petitions to the Board of Revenue, complaining of the irregularity of the sale, and its excess in quantity. The Board, however, after corresponding with the Collector, expressed themselves satisfied of the validity of the sale; and by an order of the 15th of *August* 1815, confirmed the same to the Appellant.

On the day following (16th *August* 1815), the *Ranee* presented a further petition to the Board of Revenue, to which no answer was returned; and, on the 1st of *September* (1815), the acting Collector ordered an *amil-dastak* (or order giving possession of the *zemindary*) to be granted to the *Maha-rajah*, in confirmation of the sale; and, on the 2nd of *September* 1815, granted a *sunud* (or deed of sale), directed to the inhabitants of the *talook* of *Belkhuruh*, commanding them in future to consider the *Maha-rajah* the proprietor and *malguzar* of the said *talook*, and to settle the *malguzary* with him without any dispute or contention.

On the 4th of *September* 1815, *Hurdial Sing*, as agent of the *Maha-rajah*, presented a petition to the Collector, praying the aid and interference of Government, to quiet the purchaser in the possession of the purchased estate. Upon this petition it was ordered, that a notification be made, according to clause 5, sec. 29,

Reg. VII. 1799, for the entry of the sale-purchaser; and that a *perwanna* be issued to the *vakeel* of Government, according to rule, to present a petition to the *Zillah* Court for the same purpose. In the course of the proceedings which were subsequently held before that Court, with reference to the purchaser's being in the quiet possession of his purchase, it was, on the 4th of *December* 1815, ordered by the Court that the record-keepers of the collectorate of *Bahar* should send a statement of the *talook* of *Belkhuruh*; and, in compliance with this order, a special report, dated the 19th of *December* 1815, was made, setting forth the nature, title, and description of the *talook*, as it appeared in the official documents; and the report contained also an account of the sale, and the circumstances under which it was effected.

Upon this report the Judge of the *Zillah* Court, by an order dated the 13th of *January* 1816, suspended the transfer of the property to the auction-purchaser until further inquiry, and directed that the *talook* in question should remain in the possession of the *Ranee*; and that the collector should hold in deposit the *malguzary* of the *talook* that might be paid by the parties.

Previous to the last-mentioned order of the *Zillah* Court, and on the 5th of *January* 1816, the *Maharajah* presented a further petition to the Collector of *Bahar*, praying that he might be put into possession of the property; and, on the 15th of the same month, *Meer Abd-Oollah* also presented a petition to the same effect, so far as related to his alleged share of the purchase. An order was made in this petition by the Collector on the same day, whereby it was ordered that a *perwanna* be issued to the *Maha-rajah*,

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to ascertain whether the petition under his seal, which was read on the 29th of *June* 1815, was genuine or not. In reply to this inquiry, he presented the following petition to the Collector on the 2nd of *March* 1816:—

"I have been honoured with your *perwanna*, dated the 17th of *January* 1816, agreeing with 2nd of *Magh* 1223 *Fusly*, inquiring into the circumstances of the share of *Meer Abd-Oollah* in the *talook* of *Belkhuruh*, *pergunna* of *Urol*. The fact is this: that on the 22nd of *June* 1815, I bought the said *talook* for a *lac* and ten thousand *rupees*, at the sale, and paid the price into the Treasury. Afterwards I made *Meer Abd-Oollah* and *Gokul Chund* partners, each of a fourth share of the purchase, in all *eight-anas'* share of the whole of the said *talook*; the purchase-money whereof I have received from the said sharers. I am therefore hopeful that you will strike out of the office-books my name for one *eight-anas'* share of the whole *talook*, and enter therein instead, the name of *Meer Abd-Oollah* for *one-fourth* share, and that of *Gokul Chund* for *one-fourth* share thereof, and receive their portions of the *malguzary* from them; and that my name, for the remaining *eight anas*, may remain as it is in the Book of Estates and *malguzary* of Government, the *malguzary* of which depends on me."

Meer Abd-Oollah presented to the Collector also a similar petition of the same date. On the 6th of *March* 1816, the Collector, notwithstanding the contradictory statements contained in the petition of 29th of *June* 1815, and in the petition of the 2nd of *March* 1816, ordered that *perwannas* be issued to the record-keepers and *sarrishtahdar* (head officer) of the revenue records, "that the names of *Meer Abd-Oollah* and

Gokul Chund be inserted in the office for a fourth share in each of the villages sold of the *talook* of *Belkhuruh, pergunna* of *Urol*, with the name of *Maha-rajah Mitterjeet Sing*; and that *amil-dastaks* (warrants for possession) be given in the names of *Meer Abd-Oollah* and *Gokul Chund* for their shares."

The fourth share, so registered in the name of *Gokul Chund*, was afterwards transferred to the Appellant, *Bunwaree Lal*. The name of *Mood Narain* was wholly excluded from the order, though inserted in the petition of 29th of *June* 1815.

It appeared that the Judge of the *Zillah* Court subsequently ordered possession of the estate in question to be given to the *Maha-rajah*.

In consequence of these proceedings the *Ranee* presented a petition to the *Sudder* Court, detailing the circumstances above stated, when the Judges directed that the petition should be presented to the Board of Commissioners. This was accordingly done; and on the 8th of *December* 1816, the Board declared that the *Ranee* had no other remedy than to institute a suit against the *Maha-rajah* and the Collector.

Accordingly, on the 31st of *October* 1817, the *Ranee* presented a petition of plaint to the Provincial Court of *Patna* for reversing the sale.

The plaint of the *Ranee* was filed against the Government and the *Maha-rajah*, for himself and as guardian of *Rajah Mood Narain Sing*, an infant; *Meer Abd-Oollah*; *Gokul Chund*; and *Baboo Byjnath Sahoo*, as Defendants; and it set forth the various particulars already detailed, and insisted that the sale was irregular and invalid, and ought to be rescinded; because the advertising the sale in the first instance was contrary to justice, and to clause 7, sec. 23, Reg.

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VII. 1799; and the describing the annual *malguzary* of R. 24,748. 11½ a., to be of 74 villages, was both false and fraudulent, calculated to mislead, and erroneous in description. That there was no balance due till *Phagoon* (*February* and *March*), and therefore the sale was irregular; and that the carrying the sale into effect out of the regular number was contrary to sec. 26, Reg. XIV. 1793, and repugnant to the rules and usages of the superior authorities. That the *dakhila* (receipt) of the 20th of *June* stated the amount of *amdany* or revenue, paid in on the 5th of *June* at R. 6,297, while the *sarrishtahdars* of the office, in their statement, mentioned only R. 1,632. 2 a. 5 g., as received for *amdany* on that day. That the Collector had not made himself acquainted with the receipt and balances of *malguzary*, as he was bound to do, before he ordered a sale; and that if an inquiry had been made into the amount received, the sale would have been prevented. That the agent of the *Ranee* offered at the time of the sale to pay in the balance due, but was refused. That *Hurdial Sing* was not authorized to bid at the sale on the part of the *Maha-rajah*, no *mokhtar-namah* (power of attorney) having been executed to him; and, without such, he was unable to purchase. That the contradictory statements of who the real purchaser was at the sale, and the petitions presented by *Hurdial Sing*, and *Meer Abd-Oollah*, and *Gokul Chund*, stating their purchase at the sale, proved collusion and combination between *Meer Abd-Oollah* and *Baboo Byjnath Sahoo*, the cash-keeper of Government, and the *Maha-rajah*, and rendered the sale invalid, according to sec. 15, Reg. II. 1793; and that the sale was not only a fictitious one, but that it was a purchase by the officers of the Col-

lector, both of which were prohibited. That the villages of *pergunnas Urol* and *Mussoora* were more than a hundred lots, and the matter must fall under one of two cases. That they must have considered the villages of both the *pergunnas* as one lot, or as two lots: if two lots, the amount of the receipts and balance of *malguzary* should have been of each lot; and if the lots were separate, there would have been no balance against the villages of *Urol*; and that to break the lots without performing the conditions of Reg. XXV. 1793, and Reg. I. 1801, was contrary to the Regulations; and if the lots were broken, only such portions should have been sold as would have paid the *malguzary*, and not more; and in case there was a demur to the balance on the part of the proprietor and *zemindar*, it was not proper to make the sale without removing that demur. That the *perwanna* to the Appellant, and the statement of the purchasers, claiming as partners, proved that the sale was a fictitious one, and that the Collector well knew the same. That the balance given out at the sale was infinitely greater than the truth; and the sale was for 74 villages of the *pergunna* of *Urol* (without stating names), at the enormous *jumma* of R. 24,748. 11½ a., and, after the sale, an *amil-dastak* was given for 210 villages; that these could not have happened but by the fraud and collusion of the *mutsuddies*, or clerks of the Collector: for all which reasons the Plaintiff prayed that the sale might be reversed, and possession given to her of the 210 villages stated in the Collector's *sunud*, or deed, together with R. 74,246. 2½ a., the amount of *malguzary*, and R. 25,753. 13½ a., making altogether the sum of one *lac* of *rupees*.

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On the 25th of *October* 1818, the *Ranee* died; and *Ghirdharee Sing* and others were ultimately admitted, as heirs, to prosecute the suit (*a*).

After various proceedings and orders of the Court to compel the Government and the other Defendants to put in answers, the *Maha-rajah*, on the 5th of *December* 1821, filed his answer, on behalf of himself, and as guardian of *Mood Narain Sing*, his son, a minor, wherein he denied generally the allegations contained in the plaint, and insisted that the sale of the *talook* in question was valid and according to the existing Regulations, such sale having been duly advertised; and he alleged that the purchase was neither collusive or fictitious, the fact being "that he (the *Maha-rajah*) was the original purchaser, and that he made *Meer Abd-Oollah* and *Gokul Chund* partners after the purchase."

The cause came on for hearing on the 26th of *January* 1822, and no answer having been put in by the Government, an order was made that the Government *vakeel* should apply to the Collector for an answer to the plaint.

On the 22nd of *July* 1822, a replication was filed to the answers of the *Maha-rajah* and *Meer Abd-Oollah*. To this replication the *Maha-rajah* and *Meer Abd-Oollah* filed rejoinders.

On the 27th of *November* 1823, the *Maha-rajah* filed an amended answer to the plaint; he insisted, first, that the Collector was authorized in proceeding to the sale of the *talook* in question by the 3rd sec. of Reg. V. 1796, the 7th sec. of Reg. I. 1801, and the

(*a*) See *Keerut Sing* v. *Koolahul Sing*, 2 Moore's Ind. App. Cases, 331. See also *Ghirdharee Sing* v. *Koolahul Sing*, ib. 344.

25th sec. of Reg. V. 1812: secondly, that the entry of the 20th of *June*, of R. 6,297. 4 a., alleged to have been paid by the *Ranee* on account of the arrears, for which the *sarrishtahdars* had not given her credit, was obtained by favour of the officers of the Collector, and contrary to the established rule: and thirdly, that there was no breaking of a lot, against which Reg. XXV. 1793, and Reg. I. 1801, provides; but that the sale was effected pursuant to 25th sec. of Reg. V. 1812, and, under the circumstances in which the property had been placed, was conformable to the 3rd sec. of Reg. V. 1796, and 7th sec. of Reg. I. 1801.

To this amended answer a replication was filed on the 13th of *January* 1824, and the Defendant, the *Maha-rajah*, rejoined.

Various urgent applications and orders were addressed by the Court to the Collector, to put in the answer of Government, which, it appeared, was delayed by the circumstance of the papers in the case being under the consideration of the Governor-General in Council. The result of the deliberation of the Governor was, however, a determination not to defend the suit on the part of the Government.

On the 14th of *September* 1822, the Collector of *Bahar*, Mr. *Wigram Money*, in answer to a reference by the Board of Revenue of the Central Provinces, reported his opinion that the legality of the sale could not be defended; and the Board reported their disapprobation of the whole proceeding in the strongest terms. The Governor-General in Council adopted their view of the case as to the illegality and injustice of the sale, and intimated, that if the purchasers could not be in-

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duced to renounce their purchase, the Respondents should be furnished with stamp paper free of expense, to prosecute their suit for annulling the sale.

On the 13th of *August* 1824, the following *perwanna* from the Collector was addressed to the Government *vakeel*, by order of the Governor-General in Council:—"In the case of the *Ranee*, the wife of the late *Juswunt Sing*, against Government, and the purchasers of the sale of the *talook Belkhuruh*, of *Urol*, for the reversal of the sale, do you represent to the said Court that an answer on the part of Government to the plaint, desiring that the sale be affirmed, is unnecessary, and that the Court may decide upon the case according to justice."

On the 9th of *April* 1825, *Gokul Chund* filed his answer to the plaint, insisting on the validity of the sale, denying that there was any collusion between the officers of Government, and contending that, as the Governor-General and Board of Revenue had rejected the petition of the *Ranee* for rescinding the sale, she was precluded by the 3rd clause of sec. 6, and 1st clause of sec. 7, and by sec. 27, of Reg. XI. 1822, from instituting any suit to annul the sale; he also alleged, that he had sold his interest to the Appellant *Lala Bunwaree Lal.*

To this answer the Plaintiffs replied.

The cause being at issue, documentary evidence was produced on behalf of the Plaintiffs, consisting of copies of the old books of settlement of the villages in the *pergunnas* of *Urol* and *Mussoora*; extracts from the *towjee* (monthly) accounts of *kists* (revenue) and payments on account of collections; the original petitions of the *Ranee*, for indulgence in payment of the revenue due in 1815; the first and second advertise-

ments for the sale; the proceedings of the Collector, recording the purchase of the *zemindary* in question; the *sunud*, or deed of sale; certain proceedings of the Collector of *Bahar*, annulling the sale of other villages, and of the *Zillah* Court, suspending the transfer of the property to the auction purchasers; and the final orders of the Government respecting the defence of the suit.

The Defendants also produced documentary evidence, consisting, among other things, of the original *perwannas* to the *Maha-rajah* and other *zemindars*, requiring them to sign *kabooliats* for their entire *zemindaries*; the agreement of the *Ranee* to pay the full assessment on her *zemindary*; her *mokhtar-namah* in favour of *Puhulwan Sing*; the *kabooliat* or lease of the *Ranee's mokhtar* for the *pergunnas* of *Urol* and *Mussoora*; invoices of remittances and treasury receipts for monies paid in on account of the revenues of those *pergunnas*; the original statement of the Collector of *Bahar* to the Board of Revenue, of lands in that *zillah* proposed to be sold by the Collector on the 5th of *June* 1815; the advertisements for the sale; the *kabooliat* of *Puhulwan Sing*, on behalf of the *Ranee*, already stated; the several petitions on behalf of the alleged purchasers, for admission to the lands purchased, and the orders thereon; the petition of the *Ranee* for the annulling the sale; and the correspondence between the Board of Revenue and the Collector; the report of that Board to the Government, and the answer thereon; together with copies of the monthly accounts of the collections of the *mahals* in *zillah Bahar*, from *June* 1815 to *June* 1820.

In consequence of a letter from the Court of the 18th *July* 1825, various documents were sent up by

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the Board of Revenue and the Collector of *Bahar*, consisting of reports made by the *vakeel* of Government of the City Court of *Patna*, on the mode in which the sale had been advertised, the proceedings of the Collector recording the sale, and the various petitions presented by the Defendants for the transfer and possession of the property, according to their respective claims.

Nine witnesses were also examined on the part of the Defendant, *Meer Abd-Oollah*, respecting the due publication of the advertisements, and the notice given thereof to the *Ranee*; and the *vakeels* of Government were examined upon interrogatories to the same points by both the Plaintiff and Defendants.

The proceedings relative to the defence of the suit, on the part of Government, were also put in with the interlocutory petitions and orders made in the progress of the suit, together with a petition of the Appellants of the 12th *July* 1825, submitting observations on the sufficiency of the second advertisement, and the *rubakary*, or proceeding of the Court, inquiring into the publication thereof, of the 16th *July* 1825.

On the 19th *November* 1825 the cause came on to be heard before the Provincial Court of *Patna*, when the Judges, having gone minutely into all the circumstances of the case, gave judgment in favour of the Plaintiffs; and ordered that the Plaintiffs, *Ghirdharee Sing*, *Neemdharee Sing*, *Doorgpal Sing*, *Koolahul Sing*, and *Duryao Sing*, should obtain possession of the villages in dispute with their co-heirs, and that their names and shares should be inserted in the office of Government by a precept to the Collector; that the Plaintiffs should pay into the Treasury the sum of R. 2,716. 6a. 5g., the balance after the receipt of

R. 10,026. 4a., on account of the balance of *malguzary* due to the end of *Phagoon*, with interest; and the Court declared as follows:—"As it is probable that the purchasers have realized more than the price of the sale, with interest, from the profits of the villages in dispute, it is not thought necessary to give any order to return the sale-price in this case. Either of the parties who may think there is an excess of money due, may sue to realize it. As the sale was effected by the combination and misrepresentations of the officers and purchasers, and the council (i.e. the Provincial Council of *Patna*), upon the report of the Collector and letter of the Board, when an answer of Government to the plaint was required, considered the sale to be improper, and advised it (the *talook*) to be returned, with which the purchaser would not comply, and on which account Government refused giving an answer to the plaint of the late *Ranee*, no blame is attached to Government. The whole costs of both parties are therefore to be paid by the purchasers."

From this decree the *Maha-rajah* appealed to the *Sudder Dewanny Adawlut* of *Bengal*. The Provincial Court of *Patna* transmitted his appeal, together with a separate petition of the Appellant *Bunwaree Lal*, praying to be admitted to appeal in the place of *Gokul Chund*, whose interest he had purchased, and was in possession of his share of the *talook* in question.

The Appellant, the *Maha-rajah*, having presented a supplemental petition to the *Sudder* Court, setting forth that the Provincial Court had refused to examine certain witnesses, whose evidence was of importance to his case, an order was thereupon made, directing the transmission of the papers to the Judges

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of the Provincial Court, and ordering them to take the depositions of the witnesses named by him, and any further evidence which he or any other of the parties should produce to prove their claim.

In pursuance of this order the Provincial Court directed the writer of the Court to take the depositions of the Appellants' witnesses as they should attend.

The Appellant *Bunwaree Lal* submitted a list of documentary and oral evidence to the Provincial Court, which he desired to produce; and which he was permitted to prove.

The cause ultimately came on to be heard by the *Sudder Dewanny Adawlut* on the 13th of *March* 1832, and the hearing was continued on the 19th, 20th, 26th, and 27th days of the same month. On the 2nd of *April* the cause again came on, when the Court adjourned the proceedings, for the purpose of examining certain cases cited by the Appellants and Respondents as precedents; the decisions in which were ordered to be returned from the office, together with copies of certain letters regarding the promulgation of Reg. XI. 1822, which had been also insisted on.

On the 24th of *April* 1832, the cause was finally disposed of, when judgment was pronounced by Mr. *Henry Shakespear* in favour of the Respondents, thereby confirming the decision of the Provincial Court of *Patna*.

On the 29th of *May* 1832, the final decree was made, in which the following reasons were given in support of the decisions of both Courts rescinding the sale:—

"First. According to the papers of the settlement of 1197 *Fusly*, the sale of one or two villages of the

talook in dispute would have been sufficient to realise the arrears due to Government.

"Second. By the Regulations in force at the time of the sale, it was necessary for the Collector to select one or two of the said *mahals*, and to refer to the Board for permission for their sale, and not for the sale of the entire *talook*.

"Third. In the first advertisement, no particulars of the villages for sale were mentioned, as they should have been.

"Fourth. If the names of all the *aslee* and *dakhilee mahals* had been mentioned, the *talook* would have sold for twice or thrice as much as the sale price.

"Fifth. The second advertisement, postponing the sale, was not published at the villages for sale, according to sec. 5, Reg. XVIII. 1814." And the decree of the *Sudder Dewanny Adawlut* then proceeded as follows:—"Upon those grounds of the Respondents, proved by the papers, and upon consideration of the circumstances stated in the decision of the Provincial Court of *Patna*, dated the 19th of *November* 1825, for the reversal of the sale, it appears to be just and proper, upon every principle of justice, to declare that the sale in dispute was unnecessary, improper, and contrary to the Regulations: unnecessary, because there would have been no objection to the sale of one or two *mahals*; improper, and contrary to the Regulations, because by Reg. XI. 1822, the Regulations regarding sales, previous to the promulgation of that Regulation, have suffered no change or alteration. And in sec. 3, Reg. XIV. 1793, it is ordered, that if arrears of *malguzary* become due by a proprietor of land, a portion of the lands of the defaulter should be sold in proportion to the arrears, after ascertaining

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the wishes of the Board. In sec. 2, Reg. V. 1796, it is stated, that when a sale of lands becomes necessary, the Collector should with the utmost care select such portion of the lands as would, according to the statement in his possession, and the usual price of such lands, be sufficient for the arrears of Government, &c., and not more. In sec. 3, Reg. VII. 1799, it is stated, that 'the Board shall be responsible that sales are effected with the greatest care, and in a proper manner; and especially take care that Collectors select lands for sale in the most proper manner, and fix the *jumma* according to the Regulations.' When sec. 2, Reg. V. 1796, was amended by sec. VI. Reg. I. 1801, a further power was given to the Board, that whenever they consider the amount of arrears may be realized by a sale of lands, and that, compared with the value of the entire lands, a small excess only may arise by the sale of the entire lands, they are at liberty to have those lands sold, according to the Regulations. Moreover, by clause 2, sec. 29, Reg. VII. 1799, it is necessary that, for the information of purchasers, the lands for sale should be described at the time of sale, particularly according to the *mahals*, besides the expenses of the collections of the preceding year, and the *sudder jumma*, in such manner as to promote the sale, as far as possible, with propriety; and by sec. 9, Reg. I. 1801, it is clear that, whenever a sale of entire lands becomes necessary to realize arrears, it is requisite that, at the time of sale, their names, and the name of the *mahal* to which they belong, should be stated, according to the *quinquennial* register, and the amount of the *mokurrery jumma*; but in the sale of the *talook* in dispute, neither the acting Collector, nor the Board, who are

the protectors of the rights of defaulters, have paid attention to the provisions of the aforesaid Regulations: on the contrary, by the statement of the acting Collector, dated the 4th of *August* 1815, a suspicion arises that the said Collector referred to the Board for a sale of the lands, without ascertaining the amount of arrears or value of the lands, and without knowing that nearly the whole of the arrear for which the first advertisement was made, was paid before the day of sale, and effected the sale; from which the negligence of the officers of the Collector is evident: whereby a strong suspicion is created, that the sale of the *talook* was not effected without their collusion and artifices. In the Persian translation of cl. 3, sec. 6, Reg. XI. 1822, it is stated, that sales before or after the promulgation of that Regulation shall be valid, and not liable to be annulled, provided the order of the Board had been given for the sale of all the lots which were sold, even should any error have been made by the Collector or the Board; but such an error relates to the statement of the Collector, or orders of the Board thereon, and not to inquiries and measures which, by the Regulations in force, are for the preservation of the rights of defaulters, and for the regularity of sales. In this case it is evident, that if the acting Collector had advertised the particulars of the lands for sale at the time of the sale, the said lands would have sold for two or three *lacs* of *rupees*, of which the sale by *Gokul Chund*, as alleged, of his four *ana* share for sixty-five thousand *rupees*, to *Bunwaree Lal*, Appellant, two years and a half after the sale, if it be true, is a strong proof. Regarding the second advertisement, although by the depositions of the witnesses, which were taken by the

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order of this Court, it is certain that the *Ranee*, the widow of *Rajah Juswunt Sing*, was informed by her agent of the sale being postponed to the 22nd of *June* 1815, yet the advertisement was not published as required by sec. 5, Reg. XVIII. 1814, and the plea of the Respondent on this ground cannot be rebutted. Independently of this, according to justice and the circumstances above stated, and the decision of this Court in the case of Government and *Bal Dut Doobey*, Appellants, (No. 1,766, on the 17th of *January* 1820,) it is most proper and necessary that the sale in dispute should be reversed, and, according to the decision of the Court, that the Respondents immediately, on paying the sum of two thousand seven hundred and sixteen *rupees*, six *anas*, five *gundas*, the balance due to Government, with interest from the date of sale, be put in possession. But be it not understood, that the sale in dispute has been reversed on account of the sale price of the lands much exceeding the arrears of *malguzary* due by the proprietor; for, according to sec. 25, Reg. V. 1812, it would not be a sufficient ground to reverse the sale: but be it known, that the real ground for the reversal of the sale of the *talook* in dispute is this, that although the *jumma* of every *mahal* of the *talook* was separately entered in the settlement of 1197 *Fusly*, the Collector did not refer to the Board for the sale of a portion of the lands of the defaulter, sufficient to discharge the arrears due to Government; and it is still more wonderful that in the advertisement for the sale of the entire *talook*, the name and *jumma* of each *mahal* belonging to it was not mentioned, as ordered by the Regulations, and in consequence of which omission a great loss has been sustained by

the Respondents.—Ordered, therefore, that the decision of the Provincial Court, dated the 19th of *November* 1825, be in every respect affirmed, and all the costs be payable by the Appellants, and the Respondents be put in possession immediately, on paying the sum of two thousand seven hundred and sixteen *rupees*, six *anas*, five *gundas*, the balance due to Government, with interest from the date of the sale."

From this decree the Appellants appealed to his late Majesty in Council.

Mr. *Pemberton*, Q.C., and Mr. *Jackson*, for the Appellants, *Maha-rajah Mitterjeet Sing*, and *Meer Abd-Oollah*.

By the decree appealed from, the sale of the *talook* is set aside principally on the ground that the provisions contained in the *Bengal* Regulations authorising sales of land for arrears of revenue have not been complied with. The main questions which arise are—*first*, the propriety of the selection of the entire *talook* of *Belkhuruh* by the Government for the arrears of revenue; *secondly*, the validity of the advertisements and sale statement; *thirdly*, the assumed invalidity of the sale under Reg. VII. 1799, sec. 29, cl. 3, by reason of the purchase being made fictitiously; and *lastly*, whether the *Ranee* had not so acted, by the appropriation of the purchase-money, as to preclude the Respondents from objecting to the sale.

I. It is admitted that the *Ranee* held the *talook* in *zemindary* tenure, and that one of the incidents of this tenure by Reg. I. 1793, by which the title of the *zemindars* was originally recognised, is, that the lands are liable to sale if the revenue assessed upon them

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shall fail to be duly paid. When this event happens, the revenue authorities proceed to a sale of the whole or a part of the *zemindary* in arrear, the purchase-money, or so much of it as may be necessary, being applied in satisfaction of the arrear due from the defaulter; the question then is, whether, in this case, the selection of the entire *talook* was a justifiable exercise of the discretion vested in the revenue authorities. *Kirt Chunder Roy and others* v. *The Government* (*a*) is conclusive. In that case your Lordships held, that no excess in the value of lands sold, over the arrear of revenue due, would vitiate the sale, the Government having, by Reg. V. 1812, an absolute discretion to sell either the whole or any part of the estate for arrears, without reference to the probable produce of the sale. In delivering judgment, Mr. Baron *Parke* says, in reference to that regulation (*b*)—" It is impossible to find language better calculated to do away with all objections on the ground of excess as to the validity of sales made by order of the Revenue Board, under the sanction of the Governor-General, when an arrear exists." Here an arrear is clearly proved to have been due. But it is objected by the Respondents that the selection of so large an estate as the *talook* of *Belkhuruh* for sale for the arrears was a violation of the spirit of the Regulations. The contrary is the fact. The acts of the *Ranee*, in her dealings with the Government, and by the execution of the *kabooliat*, had constituted the 74 villages into one joint estate. It was separately registered from the other property of the *Ranee*, and was, in fact, a *pergunna* property. It is a rule to preserve the *pergunnas* and other local divisions entire, whenever it is prac-

(*a*) 1 Moore's Indian Cases, 383. (*b*) Ib. 408.

ticable: sec. 7, Reg. I. 1801. In conformity with this established practice, the selection of the entire *talook* was proper, unless there were any circumstances rendering it imperative to break up the *talook*. The propriety or expediency of the latter step has not been shown in these proceedings; and we submit that the selection of this *talook* for sale was a proper exercise of the power vested in the revenue authorities; that this discretion was judicially exercised; and that even if it were otherwise, no want of discretion merely, on the part of the Board of Revenue, of which the Appellants, as purchasers, were necessarily ignorant, can, either under secs. 24 and 25 of Reg. V. 1812, or on any other grounds, affect the validity of their purchase in a court of justice.

II. If the selection were proper, has any circumstance subsequently occurred which rendered the sale inoperative and void? To the first advertisement two objections are raised by the Respondents; *first*, that it is an inaccurate description of the property; and *secondly*, that it is incorrect in form. It is important to ascertain the principle upon which this advertisement was framed, and the facts by which its accuracy and sufficiency must be determined. To avoid disputes between the Government and the purchasers, the practice is to introduce into the advertisement only the name of the principal village or place, giving its appellation, in the district about to be sold. This is stated in the evidence to be the custom of the office. The information thus afforded was always found sufficient; for, unlike private property, the boundaries and particulars of which are matters of merely private interest, the divisions of these *zemindaries* are public and territorial. The actual divisions themselves are matters of

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general notoriety and universal concernment. This, with the amount of the *jumma*, or revenue assessed upon the property for sale, and the name of the *mahal* and *malguzar*, conveys all the general information relating to the property which is necessary or useful in an advertisement. Reg. XIV. 1793, which prescribes the form of the advertisement, does not require that any detailed particulars should be set out, other than were given in this advertisement. Reg. XVIII. 1814 is to the same effect. As the Regulations then require no detailed particulars of the property about to be sold, it is necessary to inquire whether there was a misdescription in the first advertisement. The description of 74 villages, as mentioned in the decennial settlement, and described in the *kabooliat* of the *Ranee* as 74 *jummas*, was correct. The description, after the *pergunna* had been transferred to the *zillah Shahabad*, as 210 villages, namely, 85 of *aslee*, and 125 *dakhilee*, was erroneous. This property was only recorded by 74 names, paid only 74 *jummas*, and was divided into 74 known and established local divisions. The advertisement, therefore, was right in describing it as 74 *mouzas*. *Secondly*, it is contended that the advertisement is incorrect in form, because the names of the villages are improperly described. This we have already shown is not required by Reg. XIV. 1793. And further, that the hour of sale is not mentioned, conformably to the 26th sec. of that Regulation. This objection was not urged in the Courts below; but surely such omission could not invalidate the sale. Some of the provisions of the Regulations are merely directory. Thus in the case of the *Collector of Benares and others* v. *Cosa Gir & Raj Gir* (*a*), the

(*a*) 3 Mac. Sud. Dew. Rep. 88.

Regulations relating to revenue sales provide that on the purchase of the property, the purchaser shall deposit five per cent. The purchaser in that case did not deposit five per cent. on the day of sale, and the Court held that the failure to fulfil that condition was not sufficient to invalidate the sale.

With respect to the second advertisement, it is material to bear in mind that the *Ranee* made no objection to it either before or at the sale. Sec. 5, of Reg. XVIII. 1814, does not apply. The postponement was granted to the *Ranee* as an indulgence, and, therefore, did not occur through one of the unavoidable causes which that section has in view. Indeed, there existed no necessity for issuing the second advertisement. *The Collector of Bareilly* v. *Major Hearsey* (*a*). The proceedings with regard to the notice of the sale were in every respect regular, and within the terms of sec. 7, cl. 4, Reg. XI. 1822, which is retrospective.

III. The question whether the purchase was fictitious is wholly irrelevant as between the Appellants and Respondents, for that question cannot arise unless there be a valid sale, divesting the property of the latter, and then it arises only between the Government and the purchaser. It is obvious that if the purchase had been fictitious, it was a penal matter, which Reg. VII. 1799 places exclusively within the cognizance of the Governor-General in Council. The charge that the sale was promoted and induced by the fraudulent practices of the native officers of the Collector, in concert with the Appellants, the purchasers, is without

(*a*) 3 Mac. Sud. Dew. Rep. 245.

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foundation. It was not a fictitious sale, neither was it a purchase by a Government officer. [Mr. Serjeant *Spankie*—We do not insist on that ground of objection.] It will be then unnecessary further to argue it.

IV. The application of the purchase-money to the use of the *Ranee*, at her request, precludes any subsequent question of the validity of the sale as between her and the purchasers. This should be looked at, with reference to two distinct periods of time. During the period the *Ranee* was in possession, and appropriated the purchase-money to her own purposes, her conduct, if she meant to complain of the sale, was fraudulent. After she lost possession, and still continued to appropriate the purchase-money, it amounted to a waiver and abandonment of all objection to the sale. It might not be inconsistent with any step which the defaulter might subsequently take to recover from the Government compensation for an improper exercise of its authority, if such had taken place; but as between the *Ranee*, who was divested of the estate, and the purchasers, we submit that the acceptance of the purchase-money is conclusive; for it is impossible that a party can be at the same time owner of the estate and entitled to hold the purchase-money also.

It is impossible to support the Judgment of the Courts below upon these grounds. It was a grievous injustice to set aside the sale, turn the purchaser out of possession, and assume, as the decree does, that he had realized the amount of his purchase-money, with interest at 12 per cent. during the fifteen years he was in possession. The decree is, in principle, erroneous: proceeding on the footing that the Government officers have conducted themselves illegally and indiscreetly in the conduct of the sale, it declares them free from

blame, and decrees the purchaser to lose his purchase-money. It is utterly inconsistent with every principle of justice and law to throw upon the purchaser those consequences which are attributable entirely to the Government officers, with whom the purchaser had no connection, and by whose acts, according to the law in any other country, the purchaser ought not in any degree to be affected.

Mr. *Miller*, Q. C., for the Appellant, *Lala Bunwaree Lal*,

Having the same interest as the other Appellants in maintaining the sale, did not address their Lordships.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents, the heirs of the deceased *Ranee*.

This sale was properly avoided. It is quite clear a very large estate has been sacrificed for very small arrears due to the Government. The *talook* was worth nine or ten *lacs* of *rupees*, and one of the hardships under which the *Ranee* laboured was the extreme undervalue for which the property was sold.

I. The question of propriety on the part of the Collector, in selecting the entire *talook* for sale, must be determined by the Regulations, which should be construed liberally towards the defaulter. This estate is assessed, under the decennial settlement, in seventy-four separate lots and portions, and a sale in any other form was clearly illegal. There is no Regulation in existence which imposes upon the *malguzar* who has more than one village, a legal obligation to comprise them in one lot, or to consolidate the separate assessments of the several villages. Accordingly, the prac-

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tice has been to sell the districts separately, taking so much as was necessary to satisfy the arrear, and no more. By sec. 13, Reg. XIV. 1793, it is ordered, that a portion of the estate of the defaulter should be sold in proportion to the arrears. Sec. 2, of Reg. V. 1796, declares, that the Collector should, with the utmost care, select such a portion of the lands as would be sufficient to satisfy the Government demands, and not more. Sec. 23, Reg. VII. 1799, also enacts, that the Collectors should be careful in selecting lands for sale in the most proper manner. Sec. 2, Reg. V. 1796, was found inconvenient, and was amended by sec. 6, Reg. I. 1801, by which, power was given to the Board, that when, compared with the value of the entire lands, the amount of arrear was such, that a small excess only could arise, in that case they were at liberty to sell the whole estate according to the Regulations. If the Collector had selected one village of these 74, it would have realised sufficient to have paid off the arrear, and have discharged the *Ranee* from her obligations to the Government. So extravagant an arrangement on the part of the Collector, who acted without competent authority, was unjust, and most oppressive to the *Ranee*. The spirit of the *Bengal* Revenue Regulations require, where there are separate assessments upon definite portions or districts of land, that the property should be put up for sale in separate lots. Sec. 3, Reg. V. 1796, expressly enacts, that distinct *mahals* separately assessed for the public revenue are to be sold in distinct lots. In *Meer Sheer Ali* v. *Sheikh Lootf Ali* (*a*), lands separately assessed were sold in one lot for arrears: the sale was set aside as illegal.

(*a*) 3 Mac. Sud. Dew. Rep. 63.

Again, in *Burmdeonarain Singh* v. *Hurshunkernarain Singh* (*a*), a public sale was annulled, on the ground that the villages were assessed, at the decennial settlement, as distinct *mahals*, in the names of different persons, and though they subsequently belonged to one and the same individual, yet it was held that they could not be sold to realize balances of Government as a single estate. These cases distinctly show the principle upon which the Courts in *Bengal* act with reference to the sale of property separately assessed. The sale of the entire *talook* was in violation of the spirit and letter of the Regulations then in force in *Bengal.*

II. But the sale was irregular, as well in its actual conduct, as in the preliminary proceedings. The first advertisement issued in this case was not such as was required by cl. 2, sec. 29, of Reg. VII. 1799, and sec. 9, of Reg. I. 1801. The object of the advertisement was to invite purchasers to attend the sale; but if the information given was altogether erroneous, the advertisement was illegal for want of compliance with the Regulations. There was no description in the advertisement or sale statement corresponding with what is required by the Regulations. It was altogether erroneous; it should have stated in detail every one of the *aslee* and *dakhilee* villages, to enable the bidders to understand that though it was described as 74 villages, yet it was in reality much more. Reg. VII. 1799, sec. 29, cl. 2. This is a fatal objection to the first advertisement. With respect to the second advertisement, that, we submit, must follow the fate of the first. It never was issued or pub-

(*a*) 4 Mac. Sud. Dew. Rep. 348.

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lished on the lands of the defaulter, as required by sec. 5, Reg. XXVI. 1803. This, of itself, is sufficient to annul the sale. *Bhugwunt Sing* v. *The Collector of Goruckpore* (*a*); *The Collector of Bareilly* v. *Major Hearsey* (*b*). The provisions of Reg. XI. 1822, so far as they affect the rights of the parties to this Appeal, are not retrospective, and do not apply.

III. The remaining point is the appropriation by the *Ranee*, of the surplus purchase-money. The artificial principles enforced by Courts of Equity in *England* do not extend to *India*. Even if they did, it must be shown that the party who adopts an act does so with deliberation, and is aware of the effects flowing from it; before it can be construed into an admission, it must be proved to have been done deliberately. It must be done with intention, or that intention must be a necessary and unavoidable inference of law. There is no evidence, or even a pretence, that the *Ranee* made any written application for the purchase-money. The *mokhtar*, or general agent of the *Ranee*, taking the purchase-money, and appropriating it to the payment of the subsequent arrears, was an unauthorised act. It was not within the general scope of his authority. The *Ranee* was a woman utterly helpless in the *Hindoo* state of society, unable to attend to her own affairs. It cannot be contended that, so long as the *Ranee* continued in possession of the estate, in opposition to the purchaser, she was acquiescing in the purchase. The Appellants' counsel, throughout their argument, treat the *Ranee* as the vendor; we deny she can be so considered—the Government was the vendor. There

(*a*) 3 Mac. Sud. Dew. Rep. 325.
(*b*) 3 Mac. Sud. Dew. Rep. 242.

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was no privity between the *Ranee* and the purchaser, and, therefore, the purchaser cannot have a right against her. If the Government had no power to sell the entire estate, the purchaser has no title. He must look to the Government. The remaining objection to the decree is for not directing an account or restitution of the purchase-money. There is no form of action analogous to a bill of account in the *Mofussil* Courts. It was a very just inference, after the Appellants had been sixteen years in possession, with such a beneficial purchase, to presume that they had indemnified themselves.

Mr. Justice ERSKINE:

July 6, 1842.

This appeal arises out of a suit originally instituted in the Provincial Court at *Patna*, in *December* 1817, by the late *Ranee*, the widow of *Rajah Juswunt Sing*, against the Government of *Bengal*; and also *Maharajah Mitterjeet Sing* (for himself and as Guardian of *Rajah Mood Narain Sing*), *Meer Abd-Oollah*, *Gokul Chund*, and *Baboo Byjnath Sahoo*, for the purpose of annulling the sale of the *talook* of *Belkhuruh*, in the *pergunna* of *Urol*, formerly the property of the *Ranee*, but which had been seized for arrears of revenue by the officers of the Government, and by them sold to the Appellant, *Maha-rajah Mitterjeet Sing*, for the sum of S. R. 110,000.

The grounds upon which the sale was impeached by the *Ranee*, were in substance, as collected from her plaint, that the sale was the result of a fraudulent conspiracy between the purchaser, *Maha-rajah Mitterjeet Sing*, and *Baboo Byjnath Sahoo*, the cash-keeper of the Government, and *Meer Abd-Oollah*, and also the

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officers of the Collector; that a larger extent of property than was necessary to produce the arrears due, was put up for sale, and sold; and that for the purpose of enabling the purchaser to obtain the *Ranee's* property at an inadequate price, the whole of the *talook* of *Belkhuruh* had been unnecessarily and improperly put up to sale in one lot, and that the advertisement did not sufficiently apprise those who might be expected to become bidders at the sale, what was the extent and nature of the property to be sold; that the sale having been postponed, no sufficient advertisement of the day fixed for the sale had been published according to the Government Regulations; and that by these means, property of the *Ranee*, which was worth five *lacs* of *rupees*, had been purchased by the Appellant, *Maha-rajah Mitterjeet Sing*, for the inadequate price of S. R. 110,000. The *Ranee* further complained that the purchase was made in fictitious names, and that in reality it was a purchase for the use of the Government officers, contrary to the Regulations, and that the sale was in fact of 210 villages, whereas the advertisement stated it to be of 74 villages only; and further, that the balance of arrears was incorrectly stated; that in truth no balance was due for any arrears of the *talook* that was sold, and that no notice of the advertisement had been given to the *Ranee*.

After filing her plaint, and before any further proceedings were had, the *Ranee* died, and the suit was afterwards carried on by her heirs.

The Officers of the Government put in no answer to the Plaintiff's complaint.

After instituting certain inquiries into the circumstances of the sale, the Board of Revenue appears to

have come to the conclusion that the sale had been irregularly conducted, and to have wished that the purchaser should give up the estate to the *Ranee*; but the purchaser having declined to acquiesce in their view of the case, the Government took no part in the defence.

The other Defendants, however, having put in their answers, and the pleadings having been brought to a close, a mass of evidence, both documentary and oral, was produced on both sides, and on the 19th of *November* 1825, the Provincial Court of *Patna* pronounced its decree, and thereby, after entering into an elaborate detail of all the circumstances of the case, and after stating that the sale was fictitious, and contrary to the Regulations, and was made through the collusion and misrepresentations of the officers of the Collector, and after further pointing out certain irregularities in the conduct of the sale, and the issue of the advertisements, ordered the sale to be annulled; and that the heirs of the *Ranee* should obtain possession of the villages in dispute, and that they should pay into the treasury the sum of R. 2,716. 6. 5., the balance after the receipt of R. 10,026. 4., on account of the balance of *malguzary* due to the end of *Phagoon*, with interest. The decree then proceeds thus:—

"And as it is probable that the purchasers have realized more than the price of the sale, with interest, from the profits of the villages in dispute, it is not thought necessary to give any order to return the sale price in this case; either of the parties who may think there is an excess of money due, may sue to realize it. As the sale was effected by the combination and misrepresentations of the officers and purchasers; and the Council (meaning the Provincial Council of

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Patna), upon the report of the Collector and the letter of the Board, when an answer of Government to the plaint was required, considered the sale improper, and advised the *talook* to be returned, (with which the purchaser would not comply, and on which account Government refused giving an answer to the plaint of the late *Ranee*), no blame is attached to Government. The whole costs of both parties are therefore to be paid by the purchasers."

The purchasers appealed from this decree to the *Sudder Dewanny Adawlut*, and further evidence on both sides was taken in the cause by order of that Court, and on the 29th of *May* 1832, the Court pronounced its decree, affirming the sentence of the Provincial Court, upon the ground that the sale in dispute was unnecessary and improper, and contrary to the Regulations; and after giving its reasons for this conclusion, the Court proceeds to state as follows:—"But be it understood that the sale in dispute has not been reversed on account of the sale price of the lands much exceeding the *malguzary* due by the proprietor; for, according to sec. 25, Reg. V. 1812, it would not be a sufficient ground to reverse the sale. But be it known that the real ground for the reversal of the sale of the *talook* in dispute is, that although the *jumma* of every *mahal* of the *talook* was separately entered in the settlement of 1197 *Fusly*, the Collector did not refer to the Board for a sale of a portion of the lands of the defaulter sufficient to discharge the arrears due to Government; and it is still more wonderful that in the advertisement for the sale of the entire *talook*, the name and *jumma* of each *mahal* belonging to it was not mentioned, as ordered by the Regulations, and in consequence of which

omission a great loss has been sustained by the Respondents." It was, therefore, ordered that the decision of the Provincial Court should be in every respect affirmed, and all the costs be payable by the Appellant, and the Respondents be put in possession immediately, on paying S. R. 2,716. 6. 5., the balance due to Government, with interest from the date of sale.

Against these decrees the purchasers appealed to the Queen in Council, and Her Majesty having been pleased to refer the case for hearing before the Judicial Committee, it was fully and ably argued here, on the 7th, 11th, and 17th of *December* last.

And upon the argument the learned Counsel for the Respondent, feeling that the facts proved in the Court below would not enable them to support the decrees appealed from, on the ground either of fraudulent combination between the purchasers and the Collector, or upon their plea that the sale was fictitious, or that the purchase was made on behalf of the Government officers, very properly abandoned those untenable positions; for their Lordships are satisfied, after a careful examination of the evidence, that no such case was made out by the Respondents. But it was upon the argument, strongly urged, that the sale had been justly annulled on the ground that the sale of the whole *talook*, and especially the sale of it in one lot, was unnecessary and improper, and contrary to the Regulations, and without the sanction of the Board of Revenue, and that the advertisements were insufficient in point of form, and had not been properly issued or served.

A short summary of the facts proved will render clear the view which their Lordships take of the questions before them.

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It appears that the *talook* in question consisted of 210 *mouzas*, or villages, of which 85 were original or principal villages, called *aslee*, and 125 were dependent villages or hamlets, called *dakhilee*; but these 210 villages were classed for fiscal purposes under the names of 74 of the villages, and a separate sum, called the *sudder jumma*, was, by the settlement of 1197 *Fusly*, assessed upon each of these 74 fiscal villages, the total amount of which was S. R. 24,748. 11. 10. This constituted the *sudder jumma* of the whole *talook* of *Belkhuruh*. Besides this *talook* of *Belkhuruh*, the *Ranee* was also the proprietor of four other *talooks* in other *pergunnas*, the assessments for which were entered in the same form, namely, by placing a *sudder jumma* opposite the several fiscal villages of each *talook*, and placing the sum total of these *jummas* as the *sudder jumma* of the respective *talooks*, making the *sudder jumma* of all the five *talooks* to amount to R. 41,451. 4. 15., which was the amount of revenue payable yearly by the *Ranee*, in respect of these five *talooks*.

It appeared by the evidence, and by the admission of the parties, that prior to the year 1801, separate *kabooliats*, or leases, were made in respect of each of the fiscal villages composing the several *talooks* above mentioned.

But in the year 1801, in consequence of the inconvenience arising from such an arrangement, the different *zemindars* were required to furnish a general *kabooliat* and *kistbundy* for the whole of their villages, and it was notified to the different *zemindars* that the several adjoining villages composing a *zemindary*, or held by one individual, were to be considered as one joint estate, and that all the villages of a proprietor

would be included in the name of the principal village as one *talook*.

In pursuance of this requirement and notice, the *Ranee*, by her agent *Puhulwan Sing*, on the 24th of *October* 1801, executed a *kabooliat*, by which he undertook, on the behalf of the *Ranee*, to continue to pay the sum of R. 41,451. 4. 15., the *jumma khiraj*, or assessment of the *pergunnas Urol*, *Mussoora*, *Shahpoor Mittah*, *Sanda* and *Goh*, (that being the annual *jumma* fixed at the decennial settlement,) and declared that if she should not pay the instalments monthly, according to the deed of instalment, the whole of her property and possessions might be sold at the discretion of the chief authorities, and the balance realized. And in a schedule to this instrument the names of the 74 fiscal villages, with the several assessments to each, were inserted, headed by the name of the *pergunna Urol*, with the *sudder jumma* of such assessments, followed by a similar list of the other villages and assessments, arranged under similar headings of the names and *sudder jumma* of the other *pergunnas* to which they respectively belonged.

It further appeared by the evidence, that in the month of *February* 1815, there was an arrear of revenue due to Government from the *Ranee*, in respect of these five *talooks*, to the amount of S. R. 12,742. 10. 5., and that upon the 2nd of *May* 1815, the acting Collector at *Bahar* published an advertisement for the sale of *Belkhuruh*, on *Monday*, the 5th of *June*, at the Collector's *Sudder Cutcherry* at *Bankissor*, in which the property to be sold was described in the form there set forth.

Evidence was given of the service and distribution of this advertisement, the insufficiency of which, how-

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ever, formed one of the subjects of complaint by the *Ranee*, to which it will be necessary more particularly to refer.

It appears that the estates of other defaulters had been advertised for sale on the same 5th of *June*, but before that day arrived, orders were received by the Collector from the Board of Revenue, that, with a view of affording to the *malguzars* in arrear a further indulgence in respect of time, the sales should be deferred until the 22nd of that month.

No public notice of this postponement had been given before the 5th of *June*, and a number of persons having assembled on that day, expecting a sale, the acting Collector caused it to be made known to the persons present that the sale was postponed till the 22nd of *June*, and another advertisement was prepared and delivered for distribution in the form stated in the pleadings.

Notice of the postponement was publicly given to the several persons attending for the expected sale, amongst whom was *Chumun Lal*, the agent of the *Ranee*, who had herself applied for a postponement of the sale. A copy of this advertisement was affixed to the *cutcherry* at which the sale was to have taken place, and copies of the advertisement were affixed at the different Courts in the district, but no copy of this advertisement was served on the *Ranee* herself, or affixed upon any part of the estate.

On the 22nd of *June*, the *talook* of *Belkhuruh* was put up for sale in one lot, and sold to the agent of *Mitterjeet Sing*, for the sum of S. R. 110,000, which sum was afterwards, before the 29th of *June*, paid into the Treasury. On the 29th of *June*, petitions were presented by *Mitterjeet Sing*, *Gokul Chunder*, and *Meer*

Abd-Oollah, stating that the estate had been bought by *Mitterjeet Sing*, as to one half, for his son, *Baboo Mood Narain*; as to one fourth, for *Gokul Chund*; and as to the remaining one fourth, for *Meer Abd-Oollah*; and praying that their names might be inserted as proprietors, according to their several proportions. On the 4th and 6th of *July*, petitions were presented by the *Ranee*, complaining of the sale, and praying that it might be annulled, which were laid before the Board of Revenue, and that Board (after receiving a report from the acting Collector to whom the two petitions were referred for an explanation by a letter from their acting Secretary to the acting Collector of *Bahar*, dated the 15th of *August*) declared that the Board was satisfied with the explanation relative to the sale of the estates of the *Ranee* of *Rajah Juswunt Sing*, and considered the sale legal, and accordingly confirmed it. But owing to circumstances which it is not necessary to mention, possession was not given to the purchasers until the month of *March* 1816.

It further appeared, by evidence satisfactory to their Lordships, though the fact has been disputed by the Respondents, that the balance of the purchase-money (after deducting the arrears of duty for which the sale was made, and the costs of the sale) was, from time to time, appropriated by the *Ranee* to the payment of arrears of tribute due from her, in respect of other property, and that at the time of the commencement of the suit now under Appeal, there remained the sum of R. 77. 9. 10. only, unappropriated, and that this small balance was afterwards applied by her to the like purposes.

Under these circumstances, it was contended, on the part of the Appellant, that the sale of the whole

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talook was strictly correct, according to the fair import of the Regulations then in force, and that the advertisements were issued and published agreeably to the form prescribed by the Regulations; that even if more than was necessary had been erroneously sold by the Collector, and if the form and publication of the advertisements had been defective, the sale could not be thereby invalidated; and that, at all events, neither the *Ranee* nor her heirs could now claim to have the sale annulled on such grounds, since the *Ranee* had, by appropriating the purchase-money, after it had been paid into the Treasury by the purchaser, adopted and ratified the sale, and waived all irregularities in the conduct of it; and that still less could any irregularities in the form or service of the advertisement supply any ground for annulling the sale, after such appropriation of the price.

The Respondent, on the other hand, insisted, that as the power of the Collector to sell, was a qualified power, the purchaser could only maintain his title under the sale by showing that the power had been duly exercised, and they denied that there was any sufficient evidence of any appropriation of the price by the *Ranee*, and asserted that if there was, it could not give efficacy to a sale, which was made in defiance of her protest and resistance, and contrary to law.

The first question, therefore, which their Lordships have had to consider is, whether the sale in one lot of the whole *talook*, for arrears of tribute which might have been paid off by the proceeds of some definite portion of the *talook*, was within the scope of the Collector's authority; for if the Collector had no authority to sell the whole *talook*, under the circumstances, as they stood at the time of the sale, their Lordships

assent to the argument of the Respondent's counsel, that no implied adoption of the sale by the subsequent appropriation of the price will bar the *Ranee* from reclaiming her estate on the restitution of the purchase-money.

The power of the Collector to sell the *talook* depends upon the different Regulations referred to in the argument. The Regulation XIV. 1793, after requiring certain preliminary steps not relevant to this inquiry, declares, that the lands of defaulters are liable to seizure and sale by the Collector (without legal process in any court of justice), for the discharge of arrears of revenue, but only under the sanction of the Governor-General in Council, previously obtained upon the report of the Collector, and the recommendation of the Board of Revenue, who are to recommend the sale of such a portion of the estate of the defaulter as may be sufficient for the liquidation of the amount.

By Reg. III. 1794, sec. 5, the Collector is required to submit to the Board of Revenue a statement of such lands of the defaulter as he may think it advisable to have sold to make good the arrears, and the Board of Revenue is authorized to cause the lands specified in such statement, or any other lands belonging to the defaulter, to be advertised for sale, and to report the same, but still the sale is not to take place without the previous sanction of the Governor-General in Council.

By Regulation V. 1796, the Collector is directed to be careful to select for sale such lands as, from the current value of similar lands, may appear likely to sell for the amount to be recovered by the sale, and no more

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Now, taking these Regulations together, they declare the power of the Governor in Council to sell the lands of any defaulter for the payment of the arrears of revenue, but they also declare that the Governor-General will only proceed upon the recommendation of the Board of Revenue, to whom the Collector is to report not only the arrears, but also the lands, which, in his judgment, ought to be sold for the liquidation. In forming that opinion, the Collector is required to be careful to select such lands as may appear likely to produce the amount of the arrears, and no more; and then, in order to protect the proprietor from the consequences of any miscalculation on the part of the Collector, the 3rd section of Regulation V. 1796 proceeds to direct that where the lands put up to sale consist of distinct *mahals*, separately assessed for the public revenue, they are to be sold in distinct lots, or though not separately assessed, if they be of considerable extent, and may be readily divided into distinct lots, they are to be divided and sold; and then provides that so many distinct lots only shall be sold as may be necessary to produce the amount of the arrears and costs. But where the lands are put up in one lot, the whole is to be sold, whether the amount bid for them be more or less than the sum due, and the overplus, if any, paid to the proprietor.

By Reg. VII. 1799, the sale of the land of defaulters is only to take place once a year, and in the interval the Collector is authorized to attach the lands of the defaulters; and at the close of the year, by the 5th clause of section 23, he is required to report to the Board of Revenue the amount of the arrears, and at the same time to transmit a statement of the lands for sale, sufficient to make good the arrears, and the interest

thereon to the time of the sale, to be disposed of according to the rules prescribed for public sales on account of arrears of revenue. By sec. 30, it is declared that the Board of Revenue are thereafter to conduct the sales of land in the mode prescribed by the Regulations, without any reference to the Governor-General in Council, except in cases where they require his instructions; and they are required to be particularly attentive to the proper selection of lands for sale by the Collector.

The effect of this alteration is worthy of attention; for as before this time no sale of any lands for the arrears of revenue could take place without the sanction of the Governor-General in Council, and as the Governor-General in Council claimed and exercised an indefeasible right to sell the whole or any portion of a defaulter's lands for arrears of revenue, it followed that no sale of land for such purpose, under the sanction of the Governor-General in Council, could be invalidated on the plea that too much had been selected by the Collector.

But as, by the Regulation last referred to, the Board of Revenue are authorized to conduct the sales in the mode prescribed by the Regulations, without reference to the Governor-General, it would follow that the sale in question, which was made without any reference to the Governor-General in Council, could only be sustained under this Regulation, by showing that it was sanctioned by those former Regulations.

By Reg. I. 1801, sec. 6, after reciting that the unqualified operation of the rule established by sec. 11, Reg. V. 1796, had been found prejudicial to the public interests, in the subdivision of small estates, as well as to the proprietors of such estates, by par-

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celling them into lots so inconsiderable as to prevent a competition for the purchase of them, and after authorizing the Board of Revenue, if they should judge it advisable, to sell in one lot any entire estate of which the annual assessment did not exceed S. R. 500, the Board of Revenue is thereby authorized, whenever the amount to be recovered by a sale of land shall bear such proportion to the computed value of the whole estate as may be calculated to leave only an inconsiderable surplus on the sale of the entire estate, to sell the entire estate in the manner prescribed by the Regulations, though the total annual assessment should exceed the sum of S. R. 500 above limited. In such cases, the value of the lands for sale is to be computed from the best information procurable, of their produce and extent, compared with the amount of the assessment upon them, and the current value of similar lands. And by sect. 7, it is provided that the rule in sec. 3, Reg. V., 1796, is not meant to require the division and distinct allotment of a *pergunna* or *turruf*, or other established local division; that, on the contrary, all established local divisions of known limits are, as far as possible, to be preserved entire in every possible sale of land, and to regulate, in general, the subdivision of landed property, when an estate may be divided at the public sales, and a portion disposed of as a distinct estate.

If the authority vested in the Board of Revenue had stopped here, it would have been necessary to show, not only that the sale of the whole *talook* of *Belkhuruh* had been made by the directions of the Board of Revenue, but also that such sale was authorized by the terms of the 6th & 7th sections of Reg. I. 1801, last referred to.

But by Reg. V. 1812, sec. 27, it is declared that the consideration of, and decision on, the expediency of selling the entire estate, or of disposing in the first instance of any particular part of it, resides in the Board of Revenue and Board of Commissioners respectively, subject to the control of the Government.

And by sec. 25, after reciting that no means existed by which any certain or accurate computation could be formed *à priori* of the real value of any estate, or portion of estate, it was declared that sales made at public auction, for that purpose, were not liable to be annulled by the Courts of Judicature on the ground that the proceeds of the sales had materially exceeded the amount of the arrears due from the proprietor of the land to Government, and that the Board of Revenue and Commissioners would be guided by their own discretion,—subject, of course, to any instruction from the Governor-General in Council.

By Reg. XVIII. 1814, sec. 2, it was enacted, that whenever any portion of an instalment of revenue payable in any month, remained undischarged on the 1st of the following month, the Collector might forthwith, or at any subsequent time (that arrear remaining undischarged), either after service of a written demand, or without such demand, advertise lands, the property of the defaulter, for public sale, without first submitting a statement of those lands for the previous sanction of the Board of Revenue, or Board of Commissioners, supposing the lands so advertised to constitute an entire estate, or the whole of the defaulter's right and interest in a joint estate; but in such case he was to report the same to the Board of Revenue or Board of Commissioners, and to await the Board's sanction, and on no

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account to proceed to the actual sale of the lands without the express sanction of the Board, subject to a proviso for apportioning the *jumma*, in cases in which the lot proposed to be sold constituted only a part of the defaulter's property in an estate. By sec. 4, the Board of Revenue are directed, on receipt of the Collector's report of his having advertised lands for sale, or on receipt of any statement of land proposed by him for sale, to proceed without reference to the Governor-General in Council, to determine whether the sale shall take place.

This was the last Regulation passed upon the subject before the date of the sale in question; at that time, therefore, the law stood thus:—The discretionary power of deciding whether the whole of defaulters' lands, or any, and what portion of them, should be actually sold to pay the arrears of revenue, which was originally vested in the Governor-General in Council, was transferred to the Board of Revenue and Commissioners, subject, nevertheless, to the control of the Governor-General in Council, whenever he thought fit to interpose in his executive capacity. But in order to assist the Board in this decision, and to prevent delay, it was the duty of the Collector, whenever any revenue fell in arrear, to report the amount of it to the Board of Revenue, or Board of Commissioners, and, either before or after advertising a sale, to send a statement of the particular land of the defaulter which he proposed should be sold to pay off the arrears; but the Collector was, in no case, to proceed to an actual sale without the express sanction of the Board.

The fact to be ascertained, therefore, with respect to the first question, is, whether the Board of Revenue

had, before the disputed sale, sanctioned the sale of the whole *talook* of *Belkhuruh* for the liquidation of the arrears due from the *Ranee*.

Now it appears from the evidence, that on the 24th of *April* 1815, the Collector reported to the Board of Revenue that he had advertised certain lands for sale on the 5th of *June* then next, and transmitted an abstract statement of the lands in *zillah Bahar*, proposed to be sold for the recovery of arrears of revenue due to Government up to the 1st of *Phagoon* 1222 *Fusly*, that is, to *February* and *March* 1815. He also states that he transmits a statement in Persian, together with the abstract in English; but it nowhere appears what the statement in Persian contained. And although the Collector, in this letter, states he had advertised for sale the lands mentioned in the abstract, there is no evidence in the proceedings of any advertisement of any land of the *Ranee* having been published before the 2nd of *May* following, at which date the advertisement already referred to was published. Although this advertisement specifies in the margin that seventy-four *mouzas* were to be sold for the payment of the balance due to Government, of S. R. 12,742. 10. 3., and states that the sale was to take place in conformity with the order of the Board of Revenue, yet there are no traces in the evidence of any previous notice having been forwarded to the Board of Revenue of the specific lot that it is proposed to put up for sale, and the abstract contained in the Collector's letter of the 24th of *April* gives no such information to the Board; neither, indeed, do the Regulations require that such notice should be sent previous to the advertisement; and, as the date of the orders of the Board of Revenue is not stated in the advertisement, there is no reason

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for concluding that any such authority had at that time been given for the sale of any specific lands for realizing the arrears due from the *Ranee*; and there is no evidence of any communication to the Board of Revenue of the intention of the Collector to sell the *talook* of *Belkhuruh* in one lot for that purpose. There is no direct proof, indeed, that the advertisement was ever forwarded to the Board before the sale, and if it had been, without further explanation, it would not have apprized the Board that the 74 *mouzas* proposed to be sold constituted the whole of the *talook*, or that the sale of any definite portion would be sufficient to cover the amount of the arrears. Neither is there any trace in the evidence, that the Board of Revenue, at any time before the sale, had actually given authority to the Collector to proceed to the sale of the seventy-four *mouzas* in one lot.

It may be, indeed, fairly assumed that the Board had been informed that the Collector had advertised for sale the number of *mouzas* mentioned in the abstract of the 24th of *April* 1815, and that the sale of those *mouzas* generally had been sanctioned by the Board, because it is stated that the sale of those estates had been postponed from the 5th of *June* to the 22nd of *July*, by the order of the Board, a statement sufficiently sanctioned by the subsequent confirmation of the sale; but there is not only no direct proof of any specific authority from the Board of Revenue to sell the whole *talook* in one lot,—there is not even a statement by the Collector that any such authority had been given; on the contrary, the statement by the Collector leads to the inference that none such had been received by him; for in his report in answer to the *Ranee's* complaint, that the whole *talook* had been

sold in one lot, he does not plead the specific authority of the Board, but the known general principles of the Regulations, as his justification for having so conducted the sale; a justification amply sufficient, if true, for it is only when the general directions of the Regulations are departed from, that the specific directions of the Board can be required.

But, as has been already shown by Reg. XVIII. 1814, sec. 2, the Collector is expressly forbidden to proceed to the actual sale of lands advertised, without the express sanction of the Board to whom, by the previous Regulation of 1812, was entrusted the consideration of, and the decision on, the expediency of selling the entire estate, or of disposing in the first instance of any particular part of it. And even by the earlier Regulations of 1796, when the Collector, as it should seem, conducted the sale upon general rules laid down by the Governor-General in Council, without any specific directions on any particular sale that fell within the scope of the general rules, he was bound to select for sale such lands as, from the current value of similar lands, might appear likely to sell for the amount to be recovered by the sale, and no more. And the spirit and tone of the whole code of Regulations require that where there are separate assessments upon definite portions or divisions of the property, the property should be put up to sale in separate lots, unless it should be the wish of the proprietor, or for his obvious benefit, that the whole estate should be put up in one entire lot, in which case the whole was to be sold, and the surplus paid over to him. A reference to the Regulations, therefore, shows that the plea urged by the Collector was unfounded, while the adoption of that plea argues that

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he had no express direction on the subject, and that he acted, therefore, without any sufficient legal authority.

Other Regulations were passed after the date of the sale, some of which have a retrospective operation, but none of them directly affect the question now under consideration, although one of them tends to confirm the view which has been already taken of the effect of former Regulations. The provision alluded to is in the 3rd cl. sec. 6, of Reg. XI. 1822, by which it is declared that no sale, whether made before or after the promulgation of that Regulation, shall be liable to be annulled on the grounds of informality or omission in the communications that may have passed between the Collector and Controlling Board; provided that the Board shall have actually given authority to proceed to the sale of the specific lot sold. Now for the reasons already given, this clause will not protect the sale in question, and its terms seem to imply that previous authority by the Board to proceed to the sale of the specific lot sold, was essential to the validity of all sales by the Collector.

In the course of the argument, reliance was placed upon the *kabooliat* executed by the *Ranee's* agent, by which she subjected the whole of her property and possessions to sale for any arrears that might be due. But this *kabooliat*, which was executed on the 24th of *October* 1801, was given at a time when, by the Regulations, the Board of Revenue itself had only a limited power in the sale of an entire estate; and this *kabooliat* purports at the most to give a more extended power to the *Board*, for the words "chief authorities," could not be fairly taken to vest any discretion in the Collector. But as at the date of the

sale, the Board of Revenue had, as we have seen, legislative authority for the exercise of an unlimited discretion, no additional sanction could be acquired for the Board from this *kabooliat*, and none is given by it to the Collector.

From the whole evidence in the case, therefore, their Lordships are of opinion that the sale by the Collector, of the whole *talook*, was an act unauthorized either by the general rules and principles of the Regulations, or by any specific authority previously conferred by the Board of Revenue. It remains, therefore, to be seen what effect ought to be given to the subsequent confirmation of the sale by the Board, and the supposed adoption of it by the *Ranee*.

In considering the effect of the subsequent confirmation of the sale by the Board, it must be remembered that the Board had not the supreme, but only a delegated authority, and that by the terms in which that authority was conferred, they were expressly required to exercise their discretion before the sale took place, and that there is no power conferred on them to adopt and confirm an unauthorized sale by the Collector. As their Lordships therefore are of opinion that the sale was illegal and void in the months of *June* and *July*, so they think it was not rendered valid by the unauthorized confirmation of it by the Board of Revenue, in the month of *August*. This would clearly be the case in respect of any sale since the promulgation of Reg. XI. 1822, by the express provision of sec. 25; but as that section is not retrospective, no authority can be derived from it in this case; but the principle which dictated the Regulation will supply the rule without it. And although their Lordships would have been prepared to hold that

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all mere irregularities in the improper and unnecessary sale of the whole *talook* in one lot, in the form of the advertisements and the manner of their service, had been sufficiently waived by the *Ranee* when she appropriated the surplus purchase-money to her own purposes, so as to deprive her of all claim to annul the sale on the ground of such irregularities, yet their Lordships cannot consider the *Ranee's* acquiescence in a sale made, as she had every reason to believe, by the authority of the Board of Revenue—as giving legal efficacy to a sale altogether void for the want of such authority. It is true that this case is also provided for by Reg. XI. 1822, sec. 27; but this Regulation does not in terms refer to cases of money received before the promulgation of that rule, and in justice ought not to be so extended; and though as a positive Regulation it may be considered as an useful amendment of the law, there is no known general principle upon which such a rule could be held to exist independently of express enactment.

Their Lordships, therefore, feel themselves constrained to uphold the judgment of the Courts below, so far as they annul the sale of the *talook*.

But their Lordships cannot approve of the manner in which those Courts have disposed of the pecuniary questions between the parties, either as to the purchase-money or the costs. In the view that their Lordships have taken of the case, the Appellant, the *Maha-rajah*, stands wholly free from blame. He purchased the *talook* at a public auction, which to all appearances was regularly held under the sanction of the proper authorities. He paid the purchase-money into the treasury, and after some delay got possession of the estate. The purchase-money was appropriated in part

to the payment of the arrears due from the *Ranee*, in respect of that estate; and as to the residue, applied by the *Ranee* herself to the payment of other arrears due from her upon other accounts. The Court below, without entering into any investigation of the profits made by the Appellant during his occupation of the estate, has assumed that he had reimbursed himself the amount of the purchase-money, and interest, out of the profits of the estate.

Their Lordships see no ground upon which the Court could found such an assumption. According to the *Ranee's* account, the *talook* for some years before the sale had not enabled her to pay the revenue; and there are no facts stated to show that it had been more productive in the hands of the Appellant.

Their Lordships, therefore, are of opinion that an account should be taken of the principal and interest due to the Appellant in respect of the purchase-money paid by him into the treasury, and also of the net profits made by him out of the estate during his occupation, making all just and reasonable allowances for permanent improvements made by him; and that upon payment to him by the Respondent of whatever (if anything) may appear to be due to him on taking such account, possession of the *talook* should be delivered to the Respondents. And as in their Lordships' view of the case, the Appellant, the *Maha-rajah*, stands acquitted of all blame in the transaction, their Lordships think that so much of the decree of both the Courts below as condemns the Appellants in costs, should be reversed, and that each party should bear their own costs, both in the Courts abroad and in this country, and they will advise Her Majesty accordingly.

MAHA-RAJAH ISHUREE PERSAD NARAIN SING and BABOO DEEP NARAIN SING, - - - - - - - *Appellants*,

AND

LAL CHUTTERPUT SING - - - *Respondent*.*

On Appeal from Bengal.

14th, 16th, 20th, 21st, & 28th July 1842.

A sale in 1802 of lands in *Allahabad*, for arrears of Government revenue, set aside by the *Mofussil* and *Sudder* Commissions, constituted under Reg. I. of 1821. although no suit brought to annul the sale until the year 1821. Affirmed on appeal by the Judicial Committee.

But the sale having taken place by the direction of the Government, and there being no fraud on the part of the purchaser, the Judicial Committee, under clause 2, sec. 4, of Reg. I. of 1821, awarded the purchaser compensation, to be paid by the Government.

THIS was an Appeal from a decree bearing date the 24th of *February* 1829, pronounced by the *Sudder* Special Commission, appointed under Reg. I. of 1821,† for the ceded and conquered provinces under the Presidency of *Bengal*. By this decree, so much of the previous decree of the 31st of *August* 1826, of the *Mofussil* Special Commission, constituted under the provisions of the same Regulation, as annulled a sale by auction of *pergunna Barah*, in the *zillah Allahabad*, for arrears of revenue, and decreed the restitution thereof to the Respondent, was affirmed; but so much of that decree as directed compensation out of the Government treasury in favour of the Appellant, the *Maha-rajah*, was reversed. The sale took place under these circumstances :—

* Present: Members of the *Judicial Committee*,—The Lord President (Lord Wharncliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and The Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*,—Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

† Abolished by cl. 1, sec. 10, Reg. I. 1829.

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In the year 1207 *Fusly* (A. D. 1799-1800), the *zillah* of *Allahabad* formed part of the dominions of the *Nawab Vizier* of *Oude*, and *Lal Juggut Raj*, the father of the Respondent, was at that time the *zemindary* lessee of the *pergunna Arael*, and hereditary *zemindar* of the *pergunna Barah*, which were jointly assessed at the sum of R. 320,000. In 1801, a new assessment was made by the *Nazim* (or chief officer) of the *Nawab Vizier*, *Roy Madary Lal*, whereby an increase of R. 10,000 was added, and the *jumma* of the *pergunna* fixed for two years certain at R. 330,000; and, notwithstanding this arrangement, and an agreement, signed by both parties, a further assessment was made in the same year, and *Lal Juggut Raj* was compelled by force and intimidation, to execute another deed or engagement, binding himself to pay an annual *jumma* of R. 346,000 in the two following years, instead of R. 330,000, as previously assessed and agreed.

BENGAL SECRETARIAT LIBRARY.

In the year 1801, A.D., the *Nawab Vizier* ceded the *zillah* of *Allahabad* to the East India Company, and Mr. *Ahmuty* was appointed by the British authorities Collector of the *zillah*.

The Collector, on entering on his office, issued notices, calling upon the *zemindars* to render an account of the Government dues. In obedience to this summons, *Lal Juggut Raj* attended at the Collector's office, when an arrear of R. 41,134. 15a. 3 g. appeared due from him to *Roy Madary Lal*, under the agreement so obtained from him.

The arrears continuing unliquidated, Mr. *Ahmuty*, with the sanction of the Lieutenant-Governor and Board of Commissioners, on the 30th of *October* 1802, caused the *zemindary* of *pergunna Barah* to be put up for sale by public auction, with a view of realizing the arrears,

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when the *pergunna* was purchased for R. 93,000 by *Baboo Outtroo Sing*, the *Naib*, or agent, of *Maha-rajah Oudit Narain Sing*, the then *Rajah* of *Benares*, in the name of the *Rajah's* brother, *Baboo Deep Narain Sing*, one of the Appellants, who was shortly afterwards put in possession, and to whom a deed of sale was regularly made in *November* in the following year.

In the year 1808, *Lal Chutterput Sing*, the son of *Lal Juggut Raj*, presented a petition to the Board of Commissioners, alleging that, instead of his having been in arrear when the sale took place, a balance was due to him; and that the sale was brought about through the contrivance and enmity of the Collector, and was purchased by the *Rajah* in the name of his brother, through fraud and connivance, and praying that he might be restored to his inheritance.

The Board forwarded the petition with its inclosure to the Governor-General in Council, and after stating the result of their examination of the case, concluded their report with the following paragraph :—

" It is too late to regret that the first measure of the British Government, on the introduction of its authority into the province of *Allahabad*, should have been the sale of one of the largest of the zemindaries in it, and the extirpation of an old and respectable family, and at this distance of time the interposition of Government may probably be no longer of any avail. After a lapse of six years, it must be scarcely possible to revise the collections of the successive *Sazawals* deputed by the Collector, or to revert to the different persons on whom the Collector had engaged to enforce *Juggut Raj's* claim; and from the retirement of the public officer, through whose concealment of some, and misrepresentation of other material facts, the sale

was ordered, all redress seems to be precluded. At the same time, therefore, that we submit the case to Government as one of peculiar hardship, we confess ourselves at a loss to frame any specific proposition in regard to it. Should, however, every other redress be impracticable, your Lordships may possibly consider *Juggut Raj*, under all the circumstances, entitled to some provision from Government."

In consequence of this report and recommendation, the Governor-General, on the 1st of *September* 1809, granted an annuity of R. 5,000 to *Lal Juggut Raj*.

On the 12th of *September* 1820, the Respondent, *Lal Chutterput Sing*, the son of *Lal Juggut Raj*, filed a plaint in the Provincial Court of *Benares* against the Collector of *Allahabad* and *Baboo Deep Narain Sing*, to set aside the sale of his hereditary *zemindary*, as invalid and illegal. The Plaintiff set forth the circumstances under which *Juggut Raj* had been compelled to submit to the oppressive assessment of his *pergunna* under the *Nawab Vizier's* government, and the subsequent adoption of that assessment by the British government, the inability of *Juggut Raj* to pay the same in full, the arrears, and the consequent sale of the *pergunna Barah*, which the Plaintiff alleged had been illegally and unjustly sold for arrears not legally due, at an inadequate price, the approval of which was obtained through misrepresentation and falsehood, and the sale effected by collusion and fraud. He stated himself to have been an infant at the time of the sale, that the property was hereditary property, and prayed that the sale might, under the circumstances, be declared void, and the estate restored. The Defendants answered the plaint, but no further proceedings were had in the Court of *Benares*, in consequence of the

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establishment of the *Mofussil* Special Commission, under Reg. I. of 1821.

This Regulation was passed by the Governor-General in Council, on the 13th of *January* 1821, "for the appointment of a Special Commission in the ceded and conquered provinces, for the investigation and decision of certain claims to recover possession of land illegally or wrongfully disposed of by public sale, or lost through private transfers, effected by undue influence; and for the correction of errors or omissions of the proceedings adopted by the revenue officers, in regard to the record and recognition of proprietary rights, and the assessment of the tenures, interests, and privileges of the agricultural community." The preamble stated, that "It had appeared that, in the first seven or eight years after the acquisition of the ceded provinces by the British Government, the native officers of Government, their relations, connexions, and dependents, taking advantage of the novelty of the British rule, of the weakness and ignorance of the people, and (in some cases) of the culpable supineness and misconduct of the European functionaries, under whose authority they were employed, contrived, by fraudulent and iniquitous practices, to acquire very extensive estates in several of the provinces in question, more especially in the district of *Allahabad*, *Cawnpoor*, and *Goruckpoor*, thus wrongfully depriving of their just rights a great number of the ancient landowners, and reducing them and their numerous dependents to ruin and misery. That these abuses had been chiefly practised through the perversion, to the purposes of chicanery and fraud, of the rules enacted for the collection of the Government revenue, more especially the provisions relating to the

public sale of land for arrears. Under cover of these rules, but contrary to the true intent and meaning of the law by which (though a considerable discretion was left to the Revenue authorities) the measure of a public sale was principally designed for cases of embezzlement, contumacy, or fraud, many estates were sold, from which no balance, or a very trifling balance, was due, or on which the arrear accrued without any embezzlement or wilful default on the part of the *Sudder malguzar*, and others were disposed of without an observance of the prescribed forms." It then recited, that "the existing Regulations did not vest the Civil Courts with so extensive a discretion in the adjustment of a doubtful claim, and in the relief of parties suffering hardships, as the cases in question appeared to demand;" and that "proceedings of the established Courts must necessarily partake of any defects belonging to the law which it is their duty to administer, and it would be obviously inconsistent with every sound principle, to grant a general discretion to those Courts to deviate from the law on individual views of expediency or justice;" and, "in consideration of the above circumstances, it had appeared to the Governor-General in Council to be essentially necessary to the ends of justice, that a Special Commission, with large discretionary powers, and with full authority to regulate its proceedings according to the exigencies of the cases brought before it, should be constituted, for the purpose of investigating the cases above described; of restoring to their just rights the *zemindars*, and other proprietors, who have been wrongfully dispossessed; of defining and fixing the real nature and extent of the interests and title conveyed to the purchasers in cases in which sales may be

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upheld; of restoring proprietors whose estates may, in consequence of the errors in the administration above noticed, have been transferred to another, on account of a trifling balance, or for a trifling consideration, making due compensation to the present possessors; of granting redress to persons who have lost the possession or management of their estates without just cause, under the operation of a public sale, or through any act of a revenue officer, or who may have been wrongfully excluded from engagements with Government; and of making an equitable adjustment of doubtful claims, including the relinquishment, upon due compensation, of rights acquired or held under the strict operation of the law, by means inconsistent with equity and justice, or involving excessive hardship to the sufferers."

It was therefore enacted, that a Special Commission should be constituted, for the purposes described in the preamble, to be called the "*Mofussil* Special Commission, acting under the provisions of Reg. I. of 1821." A second Commission, denominated the "*Sudder* Special Commission, acting under the provisions of Reg. I. of 1821," was also to be constituted, to superintend the proceedings, and, where necessary, to review the decisions of the *Mofussil* Commission.

The jurisdiction and duties of these Commissions were prescribed at much length, both in the Regulation itself, and also in certain resolutions of the Government, promulgated at the same time; and the Regulation of 1821 was subsequently amended and enlarged by Reg. I. of 1823.

The Governor-General in Council carried into effect this Regulation, by the appointment of the members of the two commissions, the issuing of directions for their

proceedings, and the declaration of the limits within which their jurisdiction should extend.

The Respondent then brought the subject matter of the present cause before the *Mofussil* Special Commission, and filed his plaint against the Government, *Rajah Oodit Narain Sing*, and the Appellant, *Baboo Deep Narain Sing*; whereupon an order was directed to the Provincial Court of *Benares*, to transfer the record of their proceedings in that Court to the Commission.

Rajah Oodit Narain Sing and the Appellant, *Baboo Deep Narain Sing*, put in their answers to the plaint before the Commission, but no answer was filed on the part of the Government.

A variety of evidence, consisting of documents, accounts, reports, letters, and proceedings relating to the property, were adduced as evidence by the parties in the cause, and called for by the Court from the public offices, the examination of which was not concluded until the 31st of *August* 1826, when the Court pronounced its decree, whereby it was—

"Ordered, that the sale of the *pergunna Barah* be "cancelled, and its restoration decreed to *Lal Juggut* "*Raj*, father of the Plaintiff, without prejudice to "the rights and interests of other claimants, should "there be any; that, as specified above, the sum of "R. 66,541. 9a. 6g. from the Government Treasury "(in the event of its disbursement being sanctioned by "Government), and R. 26,458. 6. 6. from the Plaintiff, "such sums of R. 66,541. 9. 6. and R. 26,458. 6. 6. "making together R. 93,000, be paid to the present "occupant; that each party pay his own costs; that "a copy of this decree be forwarded for the informa- "tion of the Central Board, in order that the pension "of Rupees 5,000 per annum, which, in consideration "of the sale of his estate, the Government had been

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"pleased to grant to *Lal Juggut Raj*, by its order "dated 1st *September* 1809, may be discontinued from "this date."

From this decree the cause was carried by appeal to the *Sudder* Special Commission, acting under the Reg. I. of 1821. The *Sudder* Special Commission affirmed so much of the decree below as adjudged the annulment of the sale, and restoration of the *pergunna* to the Respondent, and reversed such part of the decree as awarded the payment of compensation, and directed the Appellant to be held responsible for the costs of the *Mofussil* Special Commission, according to its decree, and also of that Court. The ground on which this *Sudder* Special Commission proceeded in modifying, in the manner above mentioned, the decree of the *Mofussil* Special Commission, was, that there was evidence that the *Rajah* was not ignorant of the wrong and oppression which had been committed; that the purchase was, in fact, the purchase of the *Rajah*, concealing his interest under the name of the Appellant, *Baboo Deep Narain Sing*, and was therefore fictitious; that the sale was in contravention of an express prohibition of the Government; and that, as it was not the practice of that Court to award mesne profits to be paid by the possessor to the party kept out of possession, it would be improper to give the purchaser, who had derived an enormous profit from the estate, any compensation.

The Appellants appealed to His late Majesty in Council.

The Government did not appear or intervene in any of the proceedings before the *Mofussil* or *Sudder* Commission, but the East India Company, on the admission of the appeal to His late Majesty in Council, intervened and put in a case, and prayed leave to be

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heard, so far as their interests were, or might be, concerned or affected by any adjudication on the matters involved in the appeal, and submitted that the *Sudder* Special Commission ought to be confirmed, in so far as the same decreed that no compensation should be paid by the Government on account of the sale of the *pergunna Barah*, by auction, having been annulled, or, at any rate, that it was not competent to the *Mofussil* Commission to award or assess any such compensation against the Government.

Mr. *Kindersley*, Q. C., Mr. *G. Richards*, Q. C., and Mr. *Walpole*, for the Appellants.

Mr. *L. Wigram*, Q. C., and Mr. *Jackson*, for the Respondents; and

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, Mr. *Edmund F. Moore*, and Mr. *C. Buller*, Jun., for the East India Company, intervening in the Appeal.

On the question of length of possession of the *zemindary* by the Appellants, it was contended that the Commissioners should have dealt with it in such way as Courts of Equity in *England* have done, and held the Respondent's claim barred by lapse of time. In support of which position, *Gregory* v. *Gregory* (*a*), and *Hovenden* v. *Lord Annesley* (*b*), were referred to. The other points raised during the argument are fully stated and considered in the Judgment.

The Vice-Chancellor KNIGHT BRUCE:

This case has been properly argued on the merits. 4th
The doubt suggested by one of the learned counsel for the Appellants, whether the district to which the *ze-*

(*a*) Cooper's Ch. Cases, 201. (*b*) 2 Sch. & Lef. 632.

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mindary or *pergunna* in question belongs, was within the operation and powers of the Commissioners, whose judgments are before us, has not been insisted upon, and seems to us excluded from our consideration by the whole state of the cause.

We think also that the argument has rightly laid no stress on the circumstance of the son of *Lal Juggut Raj*, and not *Lal Juggut Raj* himself, though alive, having been the complaining party in the proceedings below. Having regard to the nature of the jurisdiction and question, the petition of *Lal Juggut Raj*, presented on the 1st of *March* 1825,* and the course taken by all parties, we could not have given effect to the objection if pressed.

The length of time also that elapsed between the sale of which complaint is made, and the commencement of these proceedings, though very properly urged as matter of grave consideration with reference to the judicial discretion to be exercised, and the mode of exercising it, has with equal propriety been admitted on the part of the Appellants not to form an objection to the jurisdiction, or a bar to relief in a case such as the present.

* This petition was presented to the Commissioners in consequence of their having directed *Lal Juggut Raj* to attend before them; it pleaded (*inter alia*), "That old age, its infirmities, and the pain and grief arising from the loss of such a valuable patrimony, had so distracted the petitioner, that he was unable to attend on the Commission;" and stated, "that it was then a long time that the petitioner had delegated to his son and sole heir the entire management and control of the family business, and retired into seclusion. That for the reasons above stated, he had discontinued attending public offices, and was, therefore, entirely ignorant of the rules and practices of the Courts; and that he was consequently constrained to depend entirely on the exertions of his son, and the justice of his cause."

In the rejoinder, indeed, of *Deep Narain Sing* before the *Mofussil* Commission, he thus expresses himself upon the subject of time:—"That as the special pleas urged by this Defendant in his reply, filed in the Court of Appeal for the division of *Benares*, to show that Plaintiff's action was not cognisable by that Court, owing to the expiration of the period of limitation, &c., are considered inapplicable to the Special Commission with reference to the provisions of Reg. I. 1821, the Defendant will not therefore dwell upon them any longer in this place."

The first point in question is, or rather was, whether this case could correctly be considered as coming within either of the predicaments enumerated in the second clause of the third section of Reg. I. of 1821, under which the proceedings arise.

It was, however, conceded on the Appellants' part, in an early stage of the discussion, that whether the *Rajah* of *Benares*, or *Deep Narain Sing*, was the real purchaser, the case fell within one of those predicaments, that, namely, of the purchaser having been "an officer on the Collector's establishment, or in any way employed in the collection of the public revenue within the district, or in the private service of the Collector, or the surety of such officer, or a relation, dependant, or connection of such officer or surety." A conclusion inevitable from the *ikrar-namah*, or agreement of the 14th of *August* 1802, entered into by *Chittroo Sing*, the *mokhtar*, or agent of the *Rajah*, wherein it is stated, "that whereas, in conformity with the application of the said *Maha-rajah*, the Collector of *zillah Allahabad* has conferred on *Teca Ram* the office of *tahsildar* of *pergunna Maheeya*, a dependency of that *zillah*; and on *Poorun Sing* the office of *tah-*

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sildar of *pergunna Chael*, also a dependency of the said *zillah*, he would, within the period of one month, present to the said Collector a formal deed of surety for these *tahsildars*, under the seal and signature of the said *Maha-rajah*;"—the letter from the Collector, of the 1st of *September* 1802, to the Board of Commissioners, recommending a sale of *pergunna Barah*, by public outcry, on the 30th instant, for arrears of revenue, due from *Juggut Raj*, stated to amount to R. 44,000, without deducting or alluding to the claim of *Juggut Raj* to have such demand reduced, and the orders made thereon;—and the security bond, dated the 5th of *September* 1802, given by the *Maha-rajah* for the two *tahsildars*, pursuant to the *ikrar-namah* of his *mokhtar*.

It may be true that the pleadings below do not suggest this pointedly, or do not suggest it at all. The terms, however, of the Regulation and of the Resolution or Order of the Governor-General in Council, dated 27th *February* 1821, the nature of the jurisdiction, and the simplicity of the fact, render the omission for the present purpose not material. Nor are we to be understood as meaning to express or intimate an opinion that there is not any other (we think on the contrary that there is at least one other) of the described predicaments within which the case is plainly brought. This, however, only establishes that the Commissioners had legal authority to set aside the sale, not that the power ought, in the particular case, to have been exercised. The question then arises whether as the Commissioners were not of necessity bound to exercise it, though legally vested in them, the Respondents' pleadings before them stated, and the documents and facts in evidence, proved a case

upon which it was a right and sound exercise of discretion, to set aside the sale.

The pleadings are in our opinion sufficient for the purpose, even independently of the enlargement from form and technical rules, which is conceded to proceedings under the Commissions, perhaps by the Regulation of 1821, but certainly by the Resolutions or Order of the Government, for giving effect to that law, of the 27th of *February*, in the same year.

The documents and facts properly in evidence, whether we reject the doubtful and suspicious part, or consider it in connection with what is authentic and worthy of reliance, appear to us, upon an attentive consideration of them, assisted materially by the able discussion to which they have been subjected from the Bar, to warrant the conclusion to which both Commissions have come; that the sale of the *zemindary* or *pergunna* in question ought, notwithstanding the great lapse of time, to be set aside.

But in agreeing thus far as we do with each of the tribunals below, we desire not to be understood as adopting or acceding to all the conclusions of fact, or as following or assenting to the whole of the reasoning upon which either Commission appears to have proceeded. And especially we think it right to say, that a perusal of the letter or despatch from Lord *Wellesley* of the 8th of *March* 1802, satisfies our minds, that the clause or passage on which reliance has been placed, as if it contained a positive prohibition of such a sale as that in question, at the time when it took place, does not bear that interpretation, that it was one of advice and recommendation, and not part of the orders or directions which the document contained.

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Though differing, however, from the mandatory construction which has been put on this passage, and which the context does not allow, we are far from saying that it is a circumstance in the case not deserving attention. On the contrary, it tends to show that the supreme Government recognized the general correctness and propriety of the views suggested by the Lieutenant-Governor in his despatch of the 7th of *January* preceding.

The extract from Lord *Cowley's* despatch, of the 7th of *January*, as printed in the papers before us, is thus :—" In realizing arrears of revenue in the Company's provinces, where other means fail, recourse is had to a sale of the land, and within the eleven last years this Regulation has occasioned the sale of a large proportion of the land, and the dispossession of a great number of the old *zemindars*. Some of these may have become inferior cultivators, and some may have sought other means of livelihood ; but, under a Government so long and so well established, few have ventured, or, if they have ventured, few have been able to maintain themselves in a state of insurrection. But, from the temper, disposition, and character of the inhabitants of the ceded countries, particularly of the province of *Rohilcund*, I have no doubt that they would rather submit to the varied modes of oppression to which they have been accustomed under the *Nabob's* government, while their *zemindary* titles should be continued to them, than endure to be dispossessed of their lands in the most regular and legal mode under new Regulations. The former grievances they would think supportable, under the hope, however slender, of future redress, but the latter would drive them to despair—and from

the neighbouring countries, to which they might easily resort, they would continually infest their alienated lands. Though not prepared to give any specific detail on this subject, I am satisfied that where coercion is necessary to realize the dues of Government from defaulters, some mode less offensive should be devised, and a sale of the land only resorted to in the last extremity."

The answer of the Governor-General to that despatch is this :—" No sales of land, for the recovery of rent due to Government, should be authorized within the ceded provinces, until a more effectual settlement of the country shall have taken place."

The sale under consideration, which took place in the very year in which these important papers were written, and in the countries to which they relate, was one of that very kind which Lord *Cowley* was satisfied should be only resorted to in the last extremity, as being a measure less tolerable in the estimation of the inhabitants of these provinces, so recently added to the British empire, than the different oppressions which they had borne under their native rulers, and as calculated to drive them to despair, but which Lord *Wellesley* considered should not take place at all before a more effectual settlement of the country—a settlement that, according to our view of His Excellency's meaning, had not taken place at the time when the sale was made.

It may be said, that it was made with the sanction of the local Government, of which Lord *Cowley* was a prominent member, or the chief under the supreme Government. The sale, however, was not at *Bareilly*, but at *Allahabad*. The authority for it, if, upon the whole view of the circumstances, authority there was,

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which proceeded from *Bareilly*, was consequent upon the representations of the case made to the provisional Government by Mr. *Ahmuty*, the then Collector at *Allahabad*—representations which, as they appear to us, placed the defaults and conduct of *Lal Juggut Raj* in a light stronger and more unfavourable to him than the facts, so far as we are enabled to judge of them, really warranted. The Government at *Bareilly* may have been led to think that the case was one of the last extremity. We do not see grounds for holding that it was of that character.

Considering the circumstances under which *Roy Madary Lal* had obtained the increased *jumma* from *Lal Juggut Raj*, the large amount of that increase, the position in which himself and his property had been placed, when the subsequent documents obtained from him were obtained, the questionable and doubtful state of his accounts before, and at the time of the sale, as appears from Mr. *Ahmuty's* report, of 4th of *November* 1802, and from other sources, the high degree of probability, if not certainty, that had *Lal Juggut Raj* been allowed all that ought to have been allowed to him, the balance claimed from him would at least have been greatly reduced; considering the harsh measures used towards him, the pressure under which he was placed, during the earliest period of a Government, and an administration of public affairs, which were altogether strange and new to the country; not forgetting also the kind of notices by which the sale was preceded, and the circumstances generally by which it was accompanied and immediately followed, —we cannot, consistently with the declared object and intention of Reg. I. 1821, avoid saying, that the sale, if not protected by length of time, ought not to

stand. And that, having regard, on grounds of private justice, to the state of embarrassment, difficulty, and distress to which *Lal Juggut Raj* was reduced, as well as to the powerful adversaries opposed to him, and on grounds of general policy to the motives and spirit of the Reg. of 1821, it would be inequitable and publicly inexpedient to permit such a title to be protected by the lapse of time that has taken place. The effect that it ought to have as to the terms and conditions which should accompany the Appellants' deprivation of the property, is open to very different considerations.

Without entering into a more minute detail than is necessary, or may be expedient, we consider it right to add, that among the evidence which has most strongly influenced our minds with regard to the character of the sale, the conduct of those concerned in it, and the manner in which it should be treated, are the following documents, to which it may be as well to refer in a chronological order, commencing at a time less, we believe, than two months after the cession by the *Nawab Vizier*:—

1st. The *perwanna* to *Juggut Raj* of the 4th of *January* 1802, from the Collector, requiring him to remit on that day the Government revenue which had been called for, and promising him permission to return on the day following. The *ikrar-namah* of the 5th of *January*, of *Baboo Nek Sing*, the *sazawal*, or tax-gatherer, who had been appointed in consequence of the absconding of *Juggut Raj*, undertaking to collect the revenues due from the *pergunnas* held by him, of the next day's date. The letter and advertisement for *Juggut Raj's* apprehension, of the same date,

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coupled with the Collector's despatch to *Bareilly*, also of the 5th of *January* 1802, stating thus as to *Juggut Raj's* property:—"I have deputed a *sazawal* (*Baboo Nek Sing*) to make the collections from the *zemindars*, and as *Juggut Raj's* profits were considerable, these *pergunnas* will still yield sufficient assets to ensure the revenue of the current year to its full extent:" stating also this—"I have issued the necessary orders for the attachment of *Juggut Raj's* property, and have directed the several officers to be vigilant in apprehending his person, should he attempt to enter the Company's jurisdiction."

His despatch also to Captain *Worsley*, of the same date, in these words:—"Sir, I am just informed by one of my *sawars* (horsemen), that *Juggut Raj* was safely lodged in the fort of *Loundeh*, with a party of 300 followers. On the supposition that this account is correct, I think it will be advisable, in the first instance, to summon *Juggut Raj* to deliver up the fort, offering him the protection of Government in the event of his settling his *wasilat* for the current year. Should *Juggut Raj* make any resistance, you will be pleased to adopt the necessary measures for securing the fort, if you conceive from local investigation that such an event is practicable with the small force at present under your command, otherwise I could wish you to prevent his escape, if possible, till further assistance can be afforded. In the mean time you will report to me, should *Juggut Raj* decline to deliver up the place, the strength of the fort, the force that is likely to be opposed to you, as well as the additional troops you will require for obtaining possession and securing the person of *Juggut Raj*. If the immediate

aid of the detachment of police is required, you are authorized to withdraw that company for the present service."

We will next notice the Collector's letter of the 9th of *January* 1802, four days after, to *Juggut Raj*, informing him of the rejection of his petition to be released from the amount of collections due from him, and requiring him to make over his *wasilat* papers to *Baboo Nek Sing*, and to attend the Collector and settle his affairs. The several *perwannas* to *Baboo Nek Sing*, of various dates, in *January* and *February* 1802, directing him to collect the revenues, and to report respecting the adjustment thereof, and to *Juggut Raj* and his *dewan*, requiring him to discharge the arrears, and promising safety to his *dewan*, if he will attend and pay up the arrears. The Collector's letter of the 9th of *February*, to Mr. *Mercer*, the secretary of the Board of Commissioners, respecting the measures taken by him regarding *Juggut Raj* and the *pergunna* in question; and the *kowl-namah*, or agreement, of *Baboo Nek Sing* with *Juggut Raj*, of 21st of *February* 1802. The bond and petition of *Lal Juggut Raj*, of the same 21st of *February* 1802, agreeing to pay the revenue of the *pergunna* in question. The *perwannas* to *Baboo Nek Sing*, of the 23rd of *February*, requiring him to render up and transfer to *Baboo Ram Kishen* the *pergunna* records; to *Baboo Ram Kishen* and to *Juggut Raj*, of the 24th of *February* 1802, directing them to take charge of the same. The several *perwannas* and petitions of various dates, between the 24th of *February* and the 16th of *April*, both inclusive, all respecting the realization of the collections from the aforesaid *pergunnas*. The Collector's narrative, or order, containing a statement on the subject of *Lal Juggut Raj's*

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affairs and transactions, from the 20th of *December* 1801, to the 16th of *April* 1802. The *perwanna* to *Ram Kishen Sing* of the 17th of *April* 1802, containing further directions to collect the revenues from *pergunnas Arael* and *Barah*. The notice of the appointment of an *Amin* to act as arbitrator, for making the settlement of villages still remaining unassessed; the *perwannas* to collect the revenue; and the advertisements for sale, of various dates in *May* and *June* 1802. The petition of *Lal Juggut Raj*, complaining of inaccuracies in the account receipts of *Baboo Nek Sing*, with the Collector's answers or orders upon it, dated the 17th of *June*, and 2nd of *July* 1802. The estimate, memorandum, or sketch of account of the revenues of the *pergunnas Arael* and *Barah*, as prepared by the Collector, and upon which the bond from *Juggut Raj*, for the payment of the estimated amount by instalments, of the 29th of *June* 1802, was founded, the bond itself, and the surety, or bail-bond, of the 2nd of *July* following, of *Goman Sing* and others, for securing the same, and for the appearance of *Juggut Raj*, being all substantially contemporaneous with the petition, and the answers or orders upon it, just mentioned.

Next, the letter of introduction and recommendation from the *Rajah* of *Benares*, of *Chittroo Sing*, the agent and superintendent of the *Rajah's* household affairs, of the 25th of *July* 1802, and the documents of 14th of *August* and 5th of *September*, already mentioned, with respect to the suretyship.

Then the letter to the Board of *Bareilly*, from Mr. *Ahmuty*, dated 1st *September* 1802, more than three weeks before the period appointed by the bond dated the 29th of *June*, for the payment of the instalment of

R. 32,206. 15 a. 3 p., but silent as to that transaction, though recommending the sale of the *zemindary* of *Barah*, between which letter and the date of the answer to it (the answer being dated 11th *September*) occurs the advertisement of 8th *September* for the sale of the *zemindary* on 30th *October*.

The answer of 11th *September*, from the Board of Commissioners to Mr. *Ahmuty*, the time of the receipt of which does not appear, but which runs thus:—"Sir, I have the honour to acknowledge the receipt of your letter of the 1st inst., and am directed, by the Honourable the Lieutenant-Governor, and Board of Commissioners, to inform you that, as it appears from your letter that *Juggut Raj* still continues to persist in declining to pay the balance due from him, they authorize you to issue a proclamation, setting forth that, unless *Juggut Raj* shall appear and agree to a fair and equitable adjustment of his accounts, his estate will be publicly sold, at a period to be fixed by you, which the Board are of opinion should be rather later than the 30th of *September*, in order to afford sufficient time to *Juggut Raj* to avail himself of the opportunity now afforded to him for a satisfactory and amicable adjustment of his account."

We would, then, notice the advertisement of 18th of *September*, fixing 10th of *October* as the day of sale, and the contemporaneous *perwanna* to *Juggut Raj*, "inviting him to attend upon the Collector with confidence, and arrange his affairs;" and informing him that in the event of non-attendance, his *zemindary*, *pergunna Barah*, will be sold by public auction on the day advertised: the 25th of *September*, being the last instalment day named in *Juggut Raj's* bond, not having yet arrived.

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Then, the advertisement of the 5th of *October*, which is in these words: "On the 18th of *September* 1802, A.D., an advertisement was published, stating, that on the 10th of *October* prox., *pergunna Barah*, the *zemindary* of *Lal Juggut Raj*, would be sold by public auction, for the recovery of a Government arrear. It is now ordered that the said advertisement be cancelled, and in lieu of it another advertisement be issued, in conformity with the orders of the chief Board, under date the 11th of *September* ult., to this effect—that whereas the said *Juggut Raj* withholds the payment of a large amount of revenue justly due to Government, and contumaciously and fraudulently evades its discharge, should the aforenamed, therefore, personally attend and pay up the arrear justly due by him into the public treasury by the 30th of *October* inst., good; else the *pergunna* of *Barah*, the *zemindary* of the aforenamed person, will be sold by public auction on the aforesaid date, in liquidation of the Government balance, and the auction purchaser of the said *pergunna* will be entitled," &c.

This advertisement may or may not be the same with that which is found in the papers, and bears date the 7th of *October*, and which is to the same effect; it is, therefore, not very material to insist upon any difference between the two.

Then comes the Collector's letter to the Board of Commissioners of the 6th of *October*, wherein he says: "I have to acknowledge the receipt of your letter of the 11th ult.; and have to request that you will be pleased to report to the Honourable the Lieutenant-Governor and Board of Commissioners that, in conformity to their order, I issued on the 1st instant a proclamation, setting forth, that unless *Juggut Raj*

shall appear and agree to a fair and equitable adjustment of his accounts, his estate will be publicly sold on the 30th of the present month," and so on. "I have further had conveyed to *Juggut Raj*, who resides at present in *Bundelcund*, a copy of the proclamation, together with a *perwanna* from myself, encouraging him to return to his estate."

Lastly comes the record of the proceedings of the 30th of *October*, the day when the business was completed, the day of sale, closely followed by Mr. *Ahmuty's* despatches to the Board at *Bareilly*, of the 4th of *November* and 30th of *November* 1802, between which, and probably after which, that Board communicated with him, though to what effect is not disclosed, and seems not to be known. These despatches exhibit not only uncertainty as to the amount of the debt due, or to be considered as claimable, but a want of accuracy on the part of the Collector.

We are not unaware of the propriety and expediency in general, of giving great weight to acquiescence or delay on one side, and to long possession on the other, or of the generally questionable policy of discrediting or lessening the public faith in transactions having the sanction of the Government or its officers. These and similar considerations were, however, in the cognizance of the framers of the Regulation of 1821, and by them it was decided to be, on the whole, just and expedient, that in the peculiar position in which the inhabitants of this part of *India* were placed at the commencement of the British rule, there should not be applied to the investigation of the peculiar transactions, and the redress of the peculiar hardships which then took place, merely ordinary principles.

The Regulation of 1821 was preceded by Mr. *Stuart's*

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Minute of 1820, containing these passages:—"I solicit the attention of the Board to a matter of considerable importance. During the first six or seven years which followed the acquisition of the provinces ceded to us by the *Nawab Vizier*, the mal-administration of *Allahabad*, and some of the neighbouring districts, combined with the intrigues and influence of certain opulent and powerful natives, and the poverty and ignorance of the *zemindars* and *talookdars*, led to the abusive alienation, to a great extent, of landed estates within those districts, and to the consequent ruin and extreme misery of the proprietors. For a full detail of those transactions I refer to the reports from the Board of Commissioners."

He then refers to certain documents which are mentioned, and he proceeds to say: "From these documents, of which, for convenience of reference, extracts are annexed to this paper, the Board will observe that a Special Commission was strongly recommended by the Board and Mr. *Fortescue*, for the purpose of investigating the alleged abuses, and affording redress to the injured parties. The consideration of the measure was postponed for the time, and has not been since resumed, owing, probably, to the suspension of the introduction of a permanent settlement into the ceded provinces. Now that the measure of settlements in the ceded and conquered provinces, upon fixed and permanent principles, is again under consideration, I venture strongly to recommend to the Board the institution of a Special Commission as formerly suggested, for the purpose of investigating the abusive alienations in question. I beg accordingly to submit to the Board the accompanying paper, comprising an outline of the plan upon which the Commission should be instituted.

The investigation of these cases, with any hopes of success, will require a thorough research into voluminous and complicated revenue accounts. It will require local inquiries, and free and constant communications with the parties themselves, and with the local officers. The delays and forms of the Courts of Justice oppose great obstacles to their conducting investigations upon those principles; and the parties injured are equally incapable of supporting the expense of protracted litigation, and of defending themselves in that course of proceeding against the arts and intrigues of their opulent and powerful adversaries. These reasons I have no hesitation in urging as fully justifying a special deviation from the ordinary system of our judicial administration. The delay which has occurred is unquestionably to be regretted, but I cannot think it is a sufficient ground for excluding the injured parties from redress. It is a noble principle of the English law, that no time shall avail in favour of fraud; and I believe that there were never transactions to which the maxim was more justly applicable. It would be an afflicting reflection, that men who have acquired estates by the basest means, should enjoy all the advantages of a permanent settlement, while their victims should have their misery heightened by being the hopeless witnesses of the increasing value of the property of which they have been so iniquitously despoiled."

The Preamble of the Regulation of 1821, so far as it is material now to quote it, is thus expressed: "It has appeared that, in the first seven or eight years after the acquisition of the ceded provinces by the British Government, the native Officers of Government, their relations, connections, and dependents,

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taking advantage of the novelty of the British rule, of the weakness and ignorance of the people, and (in some cases) of the culpable supineness and misconduct of the European functionaries, under whose authority they were employed, contrived, by fraudulent and iniquitous practices, to acquire very extensive estates, in several of the provinces in question, more especially in the districts of *Allahabad*, *Cawnpoor*, and *Goruckpoor*; thus wrongfully depriving of their just rights, a great number of the ancient land-owners, and reducing them and their numerous dependants to ruin and misery. These abuses have been chiefly practised through the perversion, to the purposes of chicanery and fraud, of the rules enacted for the collection of the Government revenue, more especially the provisions relating to the public sale of land for arrears. Under cover of these rules, but contrary to the true intent and meaning of the law, by which (though a considerable discretion was left to the Revenue authorities) the measure of a public sale was principally designed for cases of embezzlement, contumacy, or fraud, many estates were sold, from which no balance (or a very trifling balance) was due, or on which the arrear accrued without any embezzlement or wilful default on the part of the *Sudder malguzar*; and others were disposed of without an observance of the prescribed forms;" and then other circumstances are alluded to.

In a subsequent part of the Preamble it is said—"The persons who have suffered by the aforesaid abuses, are, for the most part, poor and ignorant men, unaccustomed, under the former Government, to any regular system of law, little acquainted with the principles of the British Code, or the regular forms of

British judicial proceedings, incapable of availing themselves of the protection it was designed to afford, and possessing not the means of securing the aid of individuals better informed, while those opposed to them are, for the most part, men of wealth and power."

It then goes on to make other important observations with reference to that subject, and proceeds thus: —"The proceedings of the established Courts must necessarily partake of any defects belonging to the law, which it is their duty to administer, and it would be obviously inconsistent with every sound principle, to grant a general discretion to those Courts, to deviate from the law on individual views of expediency or justice." And then, after some further remarks, it is thus expressed:—"In consideration of the above circumstances, it has appeared to the Governor-General in Council, to be essentially necessary to the ends of justice, that a Special Commission, with large discretionary powers, and with full authority to regulate its proceedings, according to the exigencies of the cases brought before it, should be constituted for the purpose of investigating the cases above described, of restoring to their just rights the *zemindars*, and other proprietors, who have been wrongfully dispossessed," and so on; and the Rules are then laid down.

The subsequent Resolution or Order of the Government, of *February* 1821, had these passages:—Paragraph 13. "In cases, however, in which the Commission may adjudge compensation, not exceeding R. 1,000, or in which they may adjudge the repayment, by Government, of the purchase-money of any *mahal*, of which the sale may be annulled, or in which they may direct the price of the stamped paper, used for a plaint or petition of appeal, in lieu of the institution-fee, to be

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returned to the party by whom the amount may have been disbursed, an order signed by the Commissioners, and specifying the nature of the charge, shall be sufficient authority for the Collector of the district immediately to pay the amount."

Paragraph 22. "With regard to the Rules of practice, and forms of proceedings to be followed by the Commissioners, his Lordship and Council presumes that it will not be necessary materially to deviate from the course followed by the Civil Courts, with this important exception, that it shall be specially their duty to institute an active inquiry into all the circumstances of the cases brought before them, and to take their own course for the investigation of the truth, without confining themselves to the points stated by the parties, or by any technical forms of pleading or management."

Paragraphs 25 and 26 are of the same character.

Paragraph 32, is thus.—"It is not, however, the personal character of the officers entrusted with the administration of civil justice, that has chiefly led to the institution of this official tribunal. In determining on the measure, his Lordship in Council has been still more influenced by the persuasion, that the system under which those Officers have to act, and the laws which they were bound to administer, are seriously defective in their application to the ceded and conquered provinces. While the principles of Revenue management were very imperfectly settled, the Revenue authorities have been compelled to decide on the most important points relative to private rights amidst the uproar of a general settlement, and under the urgency of securing the Revenues of inordinately extensive districts. That they should have frequently

erred, can excite no surprise; that their errors were extensively injurious, it would be preposterous to doubt. In many instances those errors admitted of no legal remedy by the Courts, because they were committed in the exercise of a discretion which the Courts could not legally control; and that the ordinary tribunals should, among a people new to our rule, and accustomed to the arbitrary domination of native *amils*, have failed to protect the agricultural community from the consequences of the acts of the officers of Government, even where those tribunals were competent to interpose, is assuredly no impeachment of the individual functionaries by whom they were filled, nor any conclusive proof that they are not generally well adapted to secure the impartial distribution of justice between individuals, and in territories long settled under our Government."

Some time afterwards, the Regulation I. of 1823 provided that, "First. Such part of cl. 1, sec. 3, Reg. I. 1821, as restricts, or can be construed to restrict, the cognizance of the Commissioners acting under the provisions of that Regulation in the matter of suits to recover possession of lands lost through public sales, to cases wherein such sales have been effected by the undue influence of a public officer, is hereby rescinded. Second. In the several cases specified in cl. 2, 4, 5, and 6, sec. 3, Reg. I. 1821, as well as in all cases wherein it may appear that any Plaintiff has been deprived of his rights by an illegal sale made within the period specified in the first clause of the said section, it shall and may be lawful for the Commissioners acting under the provisions of that Regulation, to take cognizance of any suit preferred to them, and to pass

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judgment on the same, although there may be no proof that undue influence was exercised by any public officer, to the injury of the Plaintiff. Third. Provided also, that in the cases specified in cl. 3, of the aforesaid section, if there shall be proof, or strong presumption, that the purchase or acquisition of the property sued for, was effected by violence, extortion, oppression, or fraud, it shall not be necessary for the Plaintiff to plead, or establish that undue influence was exercised."

It is in the spirit mainly of these portions of the important documents to which reference has just been made, that we have deemed it right to construe the letter of the Regulation I. of 1821. Upon that construction we consider that the *Mofussil* Commission rightly held it to be within their competency to set aside the sale, upon the terms of a payment to be made by the party succeeding in the contest to the party dispossessed by the decision, and rightly also held that the present was a case which the terms of cl. 2, of sec. 4, Regulation I. of 1821, might not improperly be held to include.

That clause is thus: "In cases in which the Commission may deprive any person of rights legally vested in him, under the existing code, or may make award upon doubtful claims, or in which the title of any person, though invalid, may have been acquired by him, *bonâ fide*, under an express or implied assurance of its validity on the part of the Board, the Collector, or Judge of the District, it shall be competent to the Commission to adjudge compensation in money from the Treasury of Government: provided, however, that in cases in which the compensation assigned to any individual shall exceed the sum of R. 1,000, the sanc-

tion of Government shall be necessary to authorize the disbursement."

A prior clause, the eighth of sec. 3, had provided thus: "The operation of the foregoing clauses shall not be confined to cases in which lands, or rights connected with land sold, transferred, alienated, or usurped, as above, may be held by the person originally benefitting by the sale, transfer, alienation, or usurpation, but shall equally extend to those in which the said lands or rights may be held under a title derived from such person: Provided, of course, that in cases in which it may appear that the person so holding under a derivative title was in no degree concerned in, or cognizant of, the original wrong, the claims of such person to compensation for any loss he may sustain under the operation of the present Regulation shall be held entitled to a very liberal consideration."

We do not on the whole think it an undue extension of cl. 2, sec. 4, to say that this case may be held to come within one of the predicaments which it describes: nor can we agree with the *Sudder* Commission in their conclusion that justice or policy did not in this case require the power of directing a payment by the successful party to the party deprived of possession, or the power conferred by cl. 2, sec. 4, to be exercised; it being our opinion, having regard to the benefit which to a certain extent *Lal Juggut Raj* derived from the purchase-money, to the course of conduct not certainly altogether justifiable, which previously to the sale he had pursued, to the great length of time that was suffered to elapse before the sale was judicially questioned, to the part which those entrusted with the functions of the local Government took in the sale, and to the

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nature and extent of the allegations and evidence by which it has been endeavoured to impeach the conduct of the late *Rajah* of *Benares* in respect of it, that both justice and policy required each of these powers to be called into action.

We think, also, upon a review of all the circumstances of the case, especially those to which reference has just been made, that it was, on the whole, proper to leave the Appellant and the late *Rajah* of *Benares* free from any account or charge in respect of the income and profits of the purchased property, from its acquisition in 1802, to the date of the *Mofussil* decree. Proved, as we think it is, by the conduct of the parties and otherwise, that the clear profits and net income derived from this source by the *Rajah* and *Deep Narain Sing*, or one of them, must have much exceeded the amount of the interest for the same time, calculated at the rate of 12 per cent. per annum, upon the R. 93,000 (the purchase-money), we consider it right, under all the circumstances (and among them, attending to the fact of the pension which the Government for some years paid to the Respondent or his family), that any claim on the part of the Appellants or the late *Rajah* of *Benares*, in respect of interest on that sum, should be treated as satisfied, but not as more than satisfied, by the income and profits; and we shall not advise Her Majesty to direct any account in this respect.

With regard to the true state of the accounts between *Lal Juggut Raj* and the Government, if taken on just and equitable principles up to the time of the sale, as well as with regard to the mode in which the sum of R. 93,000 was applied, it is probably at this time very difficult, if not impossible, to arrive at any

exact conclusion. The *Mofussil* Commission, which appears to have examined and considered the details of the facts of the case with most commendable care and attention, held, that of the R. 93,000, the sum of R. 26,458. 6a. 6p. ought to be considered as the total amount of benefit received by *Lal Juggut Raj*; nor do we see that the *Sudder* Commission viewed this particular point differently.

In such a state of things, satisfied as we are that this conclusion in point of amount, whether precisely and exactly, or not precisely and exactly, accurate, is not far remote from the truth; and unable with confidence to pronounce that it is to any extent inaccurate, we do not feel ourselves warranted in dissenting from this part of the decision of the *Mofussil* Commission.

Our view, however, of the facts and of the spirit and intention of the second clause of sec. 4, leads us, as has been stated, to the conclusion, that not only the residue of the R. 93,000, but a further sum by way of compensation, ought in this case to be paid by the East India Company to *Deep Narain Sing*. We had hoped that its amount, and this portion of the cause generally, might have been arranged by the East India Company and the parties for themselves. As it appears, however, that this cannot be done, we have been obliged ourselves to undertake the duty of fixing the amount of compensation.

Under the various and conflicting considerations to which the case is liable, and with such knowledge as we possess on the subject, we have felt much difficulty in performing this task. But judging as well as we can, after due allowance made in respect of the pension already alluded to, we deem R. 27,000 a proper sum. We conceive, therefore, that R. 120,000, with interest

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at the rate of 5 per cent. per annum (which we think the proper rate), from the date of the *Mofussil* decree (from which date we consider the Respondent as entitled to the enjoyment of the property in dispute, as between him and the Appellants), should, in respect of the sale being set aside, be paid by the East India Company to *Deep Narain Sing*, and that the East India Company should, in their accounts with *Lal Chutterput Sing* and *Lal Juggut Raj*, charge them, or one of them, with the principal and interest of the above-mentioned amount of R. 26,458. 6a. 6p.; a mode of arranging the matter which we consider due alike to them and to *Deep Narain Sing*, having regard to the proceedings that have taken place in *India* since the *Mofussil* decree.

We may add, that so far as the East India Company is concerned in this matter, it is far from irrelevant to notice the view taken of it officially by such public functionaries employed in the administration of their affairs, as Mr. *Colebrooke* and Mr. *Deane*, who, in the year 1808, a period not far removed from the time of the sale, but when, of course, the special law introduced by the Regulation of 1821 did not exist, reported on the subject to the Government in Council thus:—"We have the honour to submit for your Lordship's consideration a Petition, which has been presented to us by the former Proprietor of *pergunna Barah*, in the district of *Allahabad*, complaining of the sale made of his *zemindary* in the year 1802, together with translation of two documents produced by him, and copies of the correspondence which led to the

* These proceedings showed that the Government had been in possession of the *pergunna* from shortly after the date of the *Mofussil* Decree.

sale. Your Lordship will observe from the correspondence, that *Rajah Juggut Raj* had engaged, during the *Vizier's* Government, for the *pergunna of Arael*, in addition to his own *zemindary* of *Barah*," and so on. Mr. *Colebrooke* and Mr. *Deane* then gave a short summary of the facts, ending thus :—"That on the 2nd of *July*, Mr. *Ahmuty* admitted the validity of *Juggut Raj's* claim to certain items of credit, as deductions from the balance adjusted on the 17th *June*, which items *Juggut Raj* states in his account to have exceeded the balance charged to him, and which, if adjusted in time, might, previous to the Collector's letter of the 1st *September*, have considerably reduced, perhaps entirely extinguished, the arrear. Mr. *Ahmuty's* letter of the 4th *November*, and the account produced by *Juggut Raj*, both agree in making the gross balance, adjusted on the 17th *June*, R. 72,207, and the net balance on the *sudder jumma*, R. 44,332; the difference, R. 27,875, Mr. *Ahmuty* calls a deficiency on the assets of the *pergunna*, while the documents produced by *Juggut Raj* show it to have been those disputed items for which Mr. *Ahmuty* promised *Juggut Raj* a remission in the event of Government authorizing it, or his assistance for the recovery thereof, from the parties actually owing the money, if the remission should not be authorized. It does not appear, however, that any report on the subject was ever made to the Lieutenant-Governor, or any measures adopted for the realization of the amount from those on whom (and not on *Juggut Raj*) the loss should have fallen, or any steps taken for the adjustment of those items on which Mr. *Ahmuty* had promised to give credit. The sale of *Juggut Raj's* estate seems, on the contrary, to have been resorted to by Mr. *Ahmuty*, as the readiest

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mode of settling an intricate account, and of discharging every pledge on his part." Then follow two paragraphs, which it is unnecessary now to read, and the concluding paragraph is this:—"It is too late to regret that the first measure of the British Government, on the introduction of its authority into the province of *Allahabad*, should have been the sale of one of the largest *zemindaries* in it, and the extirpation of an old and respectable family; and at this distance of time, the interposition of Government may probably be no longer of any avail. After a lapse of six years, it must be scarcely possible to revise the collections of the successive *sazawals* deputed by the Collector, or to revert to the different persons on whom the Collector had engaged to enforce *Juggut Raj's* claims; and from the retirement of the public officer, through whose concealment of some, and misrepresentation of other, material facts, the sale was ordered, all redress seems to be precluded. At the same time, therefore, that we submit the case to Government as one of peculiar hardship, we confess ourselves at a loss to frame any specific proposition in regard to it; should, however, every other redress be impracticable, your Lordship may possibly consider *Juggut Raj*, under all the circumstances, entitled to some provision from Government."

Nor does it end there, since the subsequent papers on the subject, including the grant of the pension of R. 5,000 per annum to *Lal Juggut Raj* in the following year, 1809, to which reference has already been made, show that the Supreme Government of *India* entertained substantially the same view of the case as that taken in the despatch of Mr. *Colebrooke* and Mr. *Deane*.

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We shall humbly recommend to Her Majesty to affirm the *Sudder* decree, except as to compensation and restitution money, and costs, and to order that the East India Company shall pay to the Appellant, *Deep Narain Sing*, the sum of R. 120,000, with interest at 5 per cent. per annum, from the date of the decree of the *Mofussil* Commission—this sum to be considered as in full for compensation and restitution money, in respect of setting aside the sale; and to declare, that by its payment, all claim for interest, on one hand, and for rents and profits on the other, between the Appellant and the late *Rajah* of *Benares* and the Respondent, is to be considered as extinguished; and that the debt, if any, between the Government and *Lal Juggut Raj* at the time of the sale, and all claim against the Government, in respect of having made the sale, are to be deemed in like manner to be extinguished. But that the sum of R. 26,458. 6a. 6p., part of the sum of R. 120,000, is, with the interest from the date of the decree of the *Mofussil* Commission, at the rate of 5 per cent. per annum on the R. 26,458. 6a. 6p., to be made good to the East India Company, by charging, and they are accordingly to be at liberty to charge, the Respondent in account therewith, and they are to be at liberty to deduct the same from what may be coming from them in respect of the *zemindary*, its profits, or revenues. Each party is to bear his own costs of every stage of the proceedings, from their first commencement before the *Mofussil* Commission to the present time, with liberty to apply to the *Sudder* Commission.

JEWA-JEE and Seventeen Others, with MAHADEW ROW, GUNGA-JEE ROW, and GOVIND ROW, - - - } *Appellants*,

AND

TRIMBUK-JEE and JAGO-JEE, - - *Respondents*.*

On Appeal from the Sudder Dewanny Adawlut of Bombay.

9 & 12 Dec. 1842.

A claim preferred before the *Peishwa* in 1813, previous to the British rule, but upon which no adjudication was made: Held sufficient to bring the claimant within the exception of sec. 7, cl. 2, of the *Bombay* Reg. of Limitation, V. 1827, notwithstanding adverse possession, for 30 years previous to the institution of the suit.

There being two sets of Appellants, having separate interests and adverse claims against each other, as well as against the Respondents, the Judicial Committee permitted two Counsel to be heard for each set of Appellants.

THE subject matter in dispute in this Appeal was certain property and valuable rights and privileges belonging or incident to the hereditary office, under the *Mahratta* Government, of *deshmook* of the division of *Khidool* in the *Gorut pergunna* in the *Moorbad talook*, the annual income of which amounts in the whole to 1,106 rupees, 1 quarter, and 94 reas.

The property which was the subject of this claim consisted of the following particulars:—The profits and receipts of the *zemindary*, which was attached to the office of *deshmook* as a revenue office, amounting to R. 139. 44. annually; certain fees of office, levied from the inhabitants of thirty-one villages within the local extent of the jurisdiction of the office, amounting to 500 rupees a-year; the rents and profits of certain waste land held in *enam*, or free gift, amounting to R. 272. 1. 50. a-year; the *pitra*, or ceremony performed for deceased ancestors, to be collected at the rate of one rupee from each village, amounting an-

* Present: Members of the *Judicial Committee*,—Lord Campbell, Mr. Baron Parke, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*,—Sir E. Hyde East, Bart., and Sir A. Johnston, Knt.

nually to R. 30; certain contingent charges collected from each village annually, being altogether R. 15, and the toll on transportation of goods levied at the lesser *talghat*, amounting to R. 150. Of these particulars (the total yearly income of which was the above-mentioned sum of R. 1,106. 1. 94.), the Plaintiff was himself in possession of twenty *beegas* of the waste land held in *enam*. The toll levied at the lesser *talghat* was received by the Appellants, *Mahadew Row*, and *Gunja-jee Row*, and *Govind Row*, sons of *Toolja-jee Row*, three of the Defendants in the original suit, and the rest of the property comprehended in the claim of the Plaintiff was in the possession of the remaining Defendants, who were eighteen in number.

In addition to the above-mentioned particulars, there were also attached to the office of *deshmook* of the division of *Khidool* two *isafut*, or service-tenure villages; one of these villages, namely, the village of *Belgam*, was in the possession, or under the management, of the Plaintiff; the other of them, the village of *Sael*, was in the possession of the eighteen Defendants. The fees which were levied from each of these villages properly belonged to the party under whose management the village was, and on that account the income derived from them was not included in the claim of the Plaintiff.

The question at issue regarded not merely the right of the parties to the emoluments appertaining to the office, but the proportions in which they were severally intitled to possess them; and a further question was also raised, viz.,—whether the suit was barred by the *Bombay* Regulation V. 1827, for limiting the time for prosecuting civil actions. By cl. 1, sec. 1, of that Regulation, it is provided that "Whenever lands, houses,

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hereditary offices, or other immoveable property, have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him and his heirs, or others deriving right from him, such possession shall be received as proof of a sufficient right of property in the same;" and by cl. 2, sec. 7, it is provided, "Also, if the claimant have within the time of limitation preferred his claim to any authority (arbitration included) competent to try it, and satisfactory reason be shown why a decision was not passed, (such reason nowise affecting the justice of the demand,) then the period of limitation shall be reckoned from the date of the last proceeding known to the Defendant in such case."

On the 5th of *September* 1829, *Chand-jee*, who died pending the suit, filed his plaint in the Court of the Assistant Collector of the Northern *Concan*, against the three Appellants, *Mahadew Row*, *Gunja-jee Row*, and *Govind Row*, and against *Jewa-Jee*, son of *Luximon Sooria Row*, and seventeen others, being in all twenty-one Defendants, who were respectively in possession of the particulars before-mentioned, and refused to allow the Plaintiff to participate therein. The nature and origin of the Plaintiff's title, as detailed in the Plaint, were as follows:—*Cano-jee*, son of *Bap-jee*, commonly called by name *Sooria Row*, and formerly *deshmook* of the division of *Khidool*, was the common ancestor of the Plaintiff and the Defendants. *Cano-jee* had two sons, and the Plaintiff was the sole male descendant of the elder, who was named *Tookajee*; the younger son of *Cano-jee* was named *Bhica-jee*, from whom all the Defendants were alleged to be respectively descended. The Plaintiff claimed to be entitled to one half share of the estate attached to

the aforesaid hereditary office of *deshmook*, held by the common ancestor of himself and the Defendants, and descended upon them from him. The management of this estate was formerly conducted by the ancestors of the parties, but at a subsequent time, in consequence, as was alleged, of there being no person in the Plaintiff's branch of the family competent to conduct the affairs of the estate, the management of it was undertaken by the ancestors of the Defendants; who at all times, upon the occasion of marriage and other ceremonies at the house of the Plaintiff and his ancestors, was said to have defrayed the expenses. A dispute afterwards arose between the Plaintiff and *Mal-jee*, son of *Ana-jee Sooria Row*, the ancestor of the Defendants, whereupon the Plaintiff made complaint to the *Soobadar*, or Governor of the *talook Junere*, under the *Peishwa's* government, who gave the parties a letter of instruction to *Ana-jee Row*, to cause an amicable settlement to take place.. The Plaintiff stated that since that time about forty-two years had elapsed, and in order to bring himself within the period of thirty years, which is the period of limitation applicable to the subject of the suit, he made the following statement:—" Subsequently to the above proceeding, during the administration of *Pursaram Khundi Row*, *Soobadar* of the said *talook*, I went to his agent at the place called *Junere*, to complain about the said hereditary estate. For many days the nephew of *Ana-jee Sooria Row* (by name *Trimbuk-jee*, son of *Es-jee Sooria Row*, a blood relation of the Defendants) and I were arbitrating the cause before the authority, and the said *Trimbuk-jee*, by making the arrangements of the *durbar* (meaning by bribing the authority) did not allow the said arbitration to go on fairly; I then took leave of the *Soobadar*, and

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returned back. I had the management of the *isafut* (service-tenure) village *Belgam* in the said division, and about (15) fifteen *beegas* of land in lieu of the *enam* (gift) land of the said village, and the Defendants were in the habit of paying the dues of the *isafut* village to Government, though the same being however in my possession, because the Defendants had the said *enam* land; and consequently, in lieu of the moiety of my share therein, they paid the dues to Government, on the said *isafut* village on my behalf. Thus, in consequence of my right to the said estate, I hold possession of the said *isafut* village and the said land; but leaving the same, I with my family went and resided in another country, under a foreign government; consequently the said *isafut* village fell waste in a short time; and as it was customary under the *Peishwa's* government to farm the revenue of the same annually, so, after collecting the revenue of the other villages, the deficiency of this was paid by them (Defendants), because it belonged to our hereditary estate, and thus the revenue of the village was completed, and the payments were made to the farmer. Afterwards in the year *Saka* 1735, (1813-14, A. D.) I made a determination to have a personal conference with the authorities through the means of one *Chimna-jee Sewdew*, who was a *Karkoon* (transacter of business) of the *Sooba*, and was then present at the *mahals* of *Khidool* on business; and accordingly I met the said *Karkoon*, who took in writing the circumstances of my affairs, and forwarded the same to the *Sooba*, and afterwards I went and had a personal conference with the said *Sooba*. At that time *Trimbuk-jee Sooria Row*, the Defendant, was carrying on the business of the Court, and of the whole of the inherited property, and there-

fore the *Soobadar* of *Junere* caused the parties to be summoned and brought before him, and after examining the genealogical table of my family, and on seeing the letter addressed to me by *Trimbuk-jee Sooria Row*, as well as after taking into consideration the whole of the circumstances of mine and the Defendant's affairs; and on finding that I was the legal proprietor of the moiety of the hereditary estate, the said *Soobadar* made a decision to the following effect, viz. that the moiety of the said estate should be given to *Chand-jee Sooria Row*, and after passing such a decision gave me the *sunud* (patent) bearing date the Arabic year 1214, corresponding with the year A. D. 1813-14; and also the said Defendant *Trimbuk-jee Sooria Row* passed a writing under his own hand to the following effect: 'that of the management of the estate, which had been conducted by him up to the present time, now in consequence of the decision of the authority, a moiety of the same was given over to me, and that the management of the moiety of the said estate should thenceforth be conducted by me uninterruptedly.' On the execution of such a patent from the authority, and such a letter, I returned to the *Concan*, and went to bring my family, who were then residing afar off; and on bringing my family I settled in the village *Belgam*, and prepared to take the management of the hereditary estate. The year after the partition, there was then one *Pursaram Khundi Row*, Collector, *Mamlutdar* (officer in charge of the revenue of the district) of the said talook *Junere*, to whom the nephew of *Trimbuk-jee Sooria Row*, by name *Jai Ram Row*, the Defendant, gave some secret information, which caused me to be apprehended and carried to the fort of *Coonjur Gurh*, where I was kept

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a prisoner for six months. Afterwards a balance was found due to Government by the said *Trimbuk-jee Row*, and for that reason he was dismissed from the office of the manager of the hereditary estate, which was given to *Dessaye Row*, and at that time I was released from my imprisonment by the authority, and resumed my demands on the said *Dessaye Row* for the half share of the said hereditary estate; in consequence of which, out of the land held in *enam*, twenty *beegas* and three quarters *pand** of land was given to me, together with the *isafut* village, and I began to take the management of the same, notwithstanding that I was continually demanding my share of the whole estate, according to the *sunud* of the authority, and to the tenor of the said letter from the said *Trimbuk-jee Sooria Row*. At this stage of the proceeding, the authority of the British Government being established, the said *Trimbuk-jee Sooria Row* departed this life; and the said *Jewa-jee Row* and *Dessaye Row*, the Defendants, have up to this day conducted the business of the hereditary estate."

On the 15th day of *October* 1829, the eighteen Defendants, namely, those who were in possession of the whole of the property in question, except the toll levied at the lesser *talghat*, put in their separate answer to the above Plaint, which contained in substance a general denial of the Plaintiff's title. They admitted, however, the letter of *Trimbuk-jee Sooria Row* and the *sunud* of the *Soobadar*, in the year 1813-14, which the Plaintiff relied upon in his Plaint as manifesting and establishing his title; but, in order to avoid the effect of these documents, the Defendants alleged, that in the time of the *Peishwa's* government the Plaintiff

* A measure of land, twenty *pands* being equal to one *beega*.

was an outlaw, and had been engaged in the commission of various acts of violence and depredation, and that the government being desirous of securing the person of the Plaintiff, (who it was admitted then claimed a half-share of the estate in question) procured *Trimbuk-jee* to write the above-mentioned letter, and also gave to the Plaintiff the *sunud* stated in the Plaint, by way of inducement to him to come in and place himself within reach of the powers of the Government. An objection was also taken by them to the Plaint, on the ground of multifariousness.

The remaining three Defendants, *Mahadew Row*, *Gunga-jee Row*, and *Govind Row*, by their answer, denied the accuracy of the Plaintiff's statements relative to his pedigree, and alleged that *Tooka-jee*, the elder of the two sons of *Cano-jee Sooria Row*, the founder of the family, had no issue; and that *Bhica-jee*, the other son, had the following issue: the elder, *Chand-jee*, the second, *Mal-jee*, and the youngest, *Haba-jee*; that of the descendants of these three persons there were three families, shareholders of the estate, as follows: 1st. The eighteen Defendants, as the heirs of the elder son, *Chand-jee*, were entitled to one share. 2nd. The Plaintiff, as the heir of the second, *Mal-jee*, was entitled to another share; and 3rd. That they, the three Defendants, as the heirs of the youngest, *Haba-jee*, were entitled to the remaining share of the estate. They insisted consequently that the whole of the estate should be parcelled out according to this threefold division.

Between the Plaintiff and these three Defendants, there was, therefore, no subject of contest, except as to the amount of the share to which the Plaintiff was entitled, of the estate attached to the *deshmookship*.

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The Plaintiff filed his reply to the answers of the Defendants, who afterwards rejoined.

The Plaintiff produced and proved in evidence a *sunud* from the *Soobadar* of *Junere*, dated 1814-15, addressed to *Trimbuk-jee Sooria Row*, whereby it was stated, that, in the Arabic year 1215, the Plaintiff repaired to *Poona*, and represented that, in consequence of a dispute between him and *Trimbuk-jee* respecting the half-share of the estate of the *deshmookship*, he deserted the country for three years; and that, subsequently, *Trimbuk-jee* gave a letter with a guarantee of *zemindars* of eleven villages, that the management of the half-share of the said estate should be conducted by him, and that consequently he returned to town; since which one year had passed, but the half share had not been made over, nor the management allowed to be conducted by him; it was therefore directed that, according to the said letter, the Plaintiff should be allowed to continue the management of the same. The letter of *Trimbuk-jee* (one of the eighteen Defendants, and the party actually conducting the management of the estate), which was referred to in the before-mentioned *sunud*, was also produced and proved by the Plaintiff. It was dated 1813-14, and was addressed to the Plaintiff. The letter stated that there was a dispute between the parties respecting their brothership and proprietorship of the hereditary estate; whereupon the papers of the Plaintiff came before the *Sooba*, and an order was issued to make a partition of one half-share; that although the management of the whole of the estate had been conducted by the eighteen Defendants, yet then, by an order of the authority, a moiety of it was given to the Plaintiff, and that by virtue of that writing he should freely manage

the same. The Plaintiff also produced and proved another *sunud* from the *Soobadar*, addressed to the Plaintiff himself, in which the *Soobadar* acknowledged a letter previously sent by the Plaintiff, with a memorandum of his pedigree, and a copy of a letter formerly written to him by *Trimbuk-jee*, respecting the partition of the hereditary estate; and it was stated, that all the circumstances had been taken into consideration, and that a separate letter had been sent to the Plaintiff's address, causing *Trimbuk-jee* to give the Plaintiff a half-share of the said estate, and according to which he should manage the same.

The Plaintiff also examined witnesses, from whose testimony it appeared that the Plaintiff and the Defendants were of one family; that no partition of the hereditary estate had taken place; and that from the time of the *Peishwa's* government, the Plaintiff had been continually prosecuting his claims, and that the twenty *beegas* of land which was given by the Defendants to the Plaintiff was part of the *enam* land, and that the Plaintiff conducted the management of the village *Belgam* which was held in *isafut*; that for the last twenty-five or thirty years the Plaintiff had been disputing with the Defendants, but they had not given him the share in question.

The Defendants put in several mutilated and imperfect documents, which purported to be *sunuds* for quieting the possession of the *pergunnas* and villages in question. They also produced some letters, and examined two witnesses.

On the 14th of *June* 1830, Mr. *J. H. Farquharson*, the first assistant Collector of the *Zilla* of the Northern *Concan*, made his decree, observing:—"That the eighteen Defendants having retained possession of

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the whole of the said estate for upwards of thirty years, and the three Defendants having had the enjoyment of the village of *Ecklere*, and of the toll of the lesser *talghat*, and the Plaintiff having the enjoyment of the village of *Belgam* and twenty *beegas* of the *enam* land (regarding the said twenty *beegas* of land, however, the Court could not give any order),—in this manner the Plaintiff and the said Defendants had the enjoyment, and, according to that, they must continue to hold the land;" and dismissed the suit, with costs.

From this decree *Chand-jee*, the original Plaintiff, appealed to the Court of the principal Collector of the *Zilla* of the Northern *Concan*, but died before any decree was made by that Court, leaving the Respondents *Trimbuk-jee* and *Jago-jee* his sons, who were afterwards permitted to prosecute the appeal.

On the 5th of *September* 1832, the principal Collector of the *Zilla* of the Northern *Concan* made his decree, which, after recapitulating the circumstances of the case, and the judgment of the assistant Collector, dismissed the appeal, with costs, accompanied with the following observations:—"The Court understand, that it was the custom for the *Soobadars* of the late government to write letters to persons disturbing the peace of the country, in such an insinuating style as would entice them to come in; and the Court is of opinion that the original Plaintiff may in like manner have received the letter from *Trimbuk-jee*. It does not appear to the Court that any of the above letters were obtained by the parties in consequence of an arbitration or any decision, but procured in the manner above-mentioned. The Court is therefore of opinion, that the document (the *sunud*), within the limitation

of time provided for by the Regulation, agreeably to the Appellants' statement, is inapplicable. It appears also, that the Respondents and their ancestors have enjoyed the hereditary estate up to this day; it has not been established in any way that the Appellants or their ancestors have ever either conducted the management of the hereditary estate or received the privileges according to their share, and it is therefore just to disallow the Appellants' claims."

From this decree the present Respondents presented, and were allowed to prosecute, a Special Appeal to the *Sudder Dewanny Adawlut* of *Bombay*, and on the 18th of April 1835, the Acting Second Judge, *J. Kentish*, adverting to the view taken by the Collector, of the *sunud* of the *Soobadar*, recorded it as his opinion, That whatever might have been the motives for framing that *sunud*, it was clear that the claim was agitated by the original Plaintiff; that the measures said to have been adopted, however illegal, under a settled Government, nevertheless clearly demonstrated that every effort was urged to recover the rights sued for, and that under the then existing rule of the country, arbitration was out of the question. The Judge was, therefore, of opinion that the Courts had merely to satisfy themselves that the Plaintiff did attempt to recover his rights; that the *sunuds* established that fact, and that the manner and form of procedure was immaterial, provided the demand was made; that the claim was merely disputed on the grounds of the right having been so long in abeyance; that the Plaintiff therefore possessed the rights, and had not forfeited them, inasmuch as the *sunuds* securing them to him proved that the demand was made within the prescribed time. The Judge therefore

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recommended a reversal of the previous decrees, and referred the suit to the decision of a full Court.

This opinion of the Acting Second Judge afterwards received the sanction of the Court, and on the 5th day of *May* 1835, the *Sudder Dewanny Adawlut*, by its decree, reversed the decision of the assistant and principal Collectors, and made an order in favour of the present Respondents, in the terms of the original claim of the deceased Plaintiff.

From this decree the Appellants appealed to His late Majesty in Council.

The eighteen first Appellants submitted that the decree was erroneous for the following reasons:—

I.—Because the suit ought originally to have been dismissed for multifariousness, the present Appellants being sued together with the three other Appellants, *Mahadew Row*, *Gunga-jee Row*, and *Govind Row*, against whom separate and distinct claims were brought, and with whom they were in nowise jointly interested.

II.—Because the Respondents could make no case whatever against these Appellants until they had adduced satisfactory evidence of such relationship as entitled them to the share of the inheritance claimed, which they have wholly failed to do.

III.—Because, even if the Respondents had proved such relationship, the claim set up in this suit was absolutely barred by the limitations contained in Regulation V. 1827.

IV.—Because the decree of the *Sudder* Court proceeded upon an assumption altogether erroneous, viz. That the relationship and right of participation in the inheritance was admitted, and that the institution of the suit within the period of limitation was the only question in dispute between the parties, whereas the

Appellants in their pleadings and evidence, both before the principal and assistant Collector, had expressly put that point in issue.

The other three Appellants relied on the following reasons :—

I.—Because the claim of the Respondents to a moiety of the inheritance wholly depended on the adoption of *Mal-jee* by *Tooka-jee*, and because no evidence had been given of such adoption.

II. Because the decree of the *Sudder Dewanny Adawlut* proceeded on the assumption, that these Appellants had admitted the title of the Respondents to the moiety, if the same was not barred by lapse of time, whereas no such admission was ever made, and, on the contrary, these Appellants uniformly denied the title of the Respondents to such moiety.

III. Because if the Respondents had been entitled to any decree as against these Appellants, such decree could not have been for more than a share of the inheritance equal to one-third thereof, after the portions in the possession of the elder *Chand-jee* and *Mal-jee* branches were brought in, and equally divided.

IV.—Because these Appellants are the representatives of the *Haba-jee* branch, and as such are entitled to one-third of the entire estate of *Cano-jee*; and because they have not been, and are not, in possession of property equal to one-third thereof.

V.—Because if the entire inheritance held by the several branches of the family was not properly the subject of partition in this suit, yet the Respondents could be entitled only to so much of any surplus of the inheritance found in the possession of the *Haba-jee* branch, beyond their equal third part of the entire

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inheritance, as would be sufficient to give to the Respondents an equal third share of the same.

The Respondents relied on the following reasons :—

I.—Because with reference to the circumstances of the case, the suit was brought within the period of limitation prescribed by Regulation V. of 1827.

II. Because the claim of the Plaintiff to one-half share of the estate in question was fully established by the proofs and admissions in the cause.

Mr. *Burge*, Q. C., and Mr. *Edmund F. Moore*, for the eighteen first Appellants.

Mr. *L. Wigram*, Q.C., and Mr. *Jackson*, for the three other Appellants ; and

Mr. *E. J. Lloyd* and Mr. *Charles Buller*, jun., for the Respondents.

The Respondents' Counsel objected to the Appellants' cases being argued by two Counsel for each set of Appellants ; but their Lordships, under the circumstances of the hostile interests of the separate Appellants, overruled the objection ; and allowed separate replies, giving the Counsel for the eighteen Appellants the right of the last reply.

Lord CAMPBELL :

In this case their Lordships cannot take the same view of the subject that has been taken by the Courts below ; and they regret that the Judges below did not look a little more accurately into the pleadings, to see what questions were to be determined, and to the language of the Regulations of *Bombay*, by which one of the questions was to be decided.

Their Lordships are of opinion that it lay upon the

Plaintiff below to show that he was entitled to one-half of the family property; which he could only do by evidence of adoption. Now the only evidence of adoption that is brought forward is the *sunud*, and that is represented as a judgment of a court of competent jurisdiction. But their Lordships are of opinion that it cannot be so considered, because it was an intimation to one party that there should be a judgment in his favour; whereas there was an intimation by the same authority to the other party that the cause remained undecided; and that when the particular object was gained which was in view when this *sunud* was granted, then the *Sudder* Court would proceed, and there should be an adjudication between the parties. This came from the same authority. We cannot, therefore, consider that it was a judgment, binding and conclusive upon the parties.

Nor is there any admission here, by which the right of the Plaintiff to one-half can be considered as established, because, even supposing that the person by whom the admission was given could represent the other party, he made the admission, under the authority of the Government, for a particular purpose; and neither himself, nor those whom he represented, can be considered as bound by it. There appears, therefore, to be no evidence of adoption, and therefore no evidence that *Chand-jee*, the original Plaintiff, was entitled to one-half of the family property.

The next question which arises is with regard to the Regulation of Limitations; and their Lordships are of opinion, that although the *sunud* is not to be considered as a judgment binding between the parties, yet that, taken with reference to the other documents connected with it, it is sufficient to bring the case within the

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exception that has been relied upon; for it shows sufficiently that there had been a claim preferred to an authority that had a right to try and to decide the question—because we must consider that the Court to which this application was made was then the Supreme power in the State, and had authority to decide between the parties.

It is objected, however, that another condition is not complied with, namely, that there is not sufficient proof of how it was that a satisfactory and a binding decree was not obtained. But we think, that although the *sunud* cannot be considered *per se*, as a binding and regular judgment, it is enough, coupled with the admissions that were afterwards given, to account for the party not having proceeded to obtain the judgment of the Court itself, particularly, coupled with this fact, that he was admitted into occupation of part of the property.

Under these circumstances, their Lordships are of opinion, that the justice of the case will be best satisfied, by recommending to Her Majesty, to remit the cause to the Court below, the *Sudder* Court, with instructions to divide the whole of the property in equal third parts. *Chand-jee* had an opportunity of showing that he was entitled to one half—his attention was repeatedly called to that point—he was warned that it was necessary to prove the adoption. He has failed in doing so. It is admitted that there would be great difficulty now in bringing any further evidence. At all events he has had the opportunity, and has not availed himself of that opportunity. Their Lordships are, therefore, of opinion that he, and those who represent him, must be content with one third of the property. Then the three Appellants will take the

second third; and the eighteen will take the other third.

With regard to the costs, as the three parties represented by Mr. *Wigram* were from the beginning perfectly willing that the estate should be divided, upon the footing of each having a third, their Lordships think there ought to have been a decree in their favour in the first instance. Their Lordships are of opinion, therefore, that the costs of those parties below ought to be paid according to the course which has been pursued upon these appeals; and that their costs of this appeal ought to be paid by the Respondents. The costs, therefore, of the three Appellants, both of the proceedings below and of the Appeal, will be paid by the Respondents. The other parties will pay their own costs.

SYUD ABBAS ALI KHAN - - - - *Appellant*,

AND

YADEEM RAMY REDDY - - - - *Respondent*.*

On Appeal from the Sudder Dewanny Adawlut of Madras.

16th June 1843.

Debt on bond. The Defendant by his answer denied his execution of the bond. The Plaintiff, in his reply, stated the accidental destruction of the bond, and prayed leave to put in evidence a registered copy thereof, which the Court allowed, and, at the same time, ordered the fragments of the original to be produced. At the trial the Plaintiff produced the fragments, and, under sec. 11, *Madras* Reg. XVII. of 1802, put it as evidence a registered copy of the bond. He called no witnesses to prove that the fragments produced, formed part of the original bond. The Court admitted the registered, copy as evidence, and found for the Plaintiff. The Judicial Committee of the Privy Council, on Appeal, reversed this finding, on the ground that the registered copy, in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence.

THIS was an action brought by the Respondent against the Appellant, on the 17th of *October* 1819, in the *Zilla* Court of *Nellore*, to recover 200 *pagodas*, the first instalment due in respect of the principal sum of 2,346 *pagodas*, together with 281½ *pagodas*, the amount of interest on the above-mentioned principal sum, secured by a bond alleged to have been executed by the Appellant in the Respondent's favour, on the 14th of *February* 1818. The Appellant, by his answer to the plaint, denied that he had ever had any dealings with the Respondent, or that he had ever executed the bond declared upon. The Respondent, in reply, insisted that the bond was duly executed by the Appellant, but stated that, since the institution of the suit, the original bond had been accidentally destroyed by rats; and prayed that the Court would admit a copy from the

* Present: Members of the *Judicial Committee*,—The Lord President, Lord Brougham, the Vice Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*,—Sir Edward Hyde East, Sir Alexander Johnston, and Sir Edward Ryan.

Registry book, pursuant to the provisions of sec. 11, Reg. XVII. of 1802.

The *Zilla* Court of *Nellore* granted the application; and by an order of the 23rd of *November* 1819, ordered that the Plaintiff's pleader should produce the fragments of the bond destroyed by rats, as mentioned in the reply, and copies of the register of the bond, which were produced and lodged in Court.

In support of his claim, the Respondent filed an official copy from the registry, of a *vakalutnama*, or power of attorney, alleged to have been executed by the Appellant to his *vakeel*, to get the bond in question registered; an office copy of the bond from the registry-book; together with the fragments of the original bond. He also examined witnesses, two of whom stated themselves to be subscribing witnesses to the original instruments; but no further evidence was given of the destruction of the bond.

The Court having admitted the office copy of the registered bond in evidence, found for the Plaintiff for the amount sued for.

From this decree, the Appellant appealed to the Provincial Court for the Northern Division of *Madras*; and on the 15th of *August* 1826, *N. Webb*, Esq., the First Judge of that Court, delivered in his draft decree, wherein he expressed, that in his opinion the decision of the *Zilla* Judge of *Nellore* ought to be affirmed, and the appeal dismissed with costs. On the 21st instant, *R. Lord*, Esq., the Second Judge, recorded his dissent from this opinion; and in the absence of the Third Judge, who was on the circuit, the appeal stood over till his return. The Third Judge (*J. C. Todd*, Esq.) concurred with Mr. *Lord*; and the Court being divided, the Second and Third Judges, in conformity

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with sec. 11, Reg. XV. 1802, on the 4th of *October* 1826, pronounced their decree, reversing the decision of the *Zilla* Court, and dismissed the suit with costs.

From this decree the present Respondent appealed to the *Sudder Adawlut* of *Madras*.

The *Sudder Adawlut* being of opinion that further evidence was necessary to enable them to come to a just determination of the suit, directed the record to be sent back, and that the Provincial Court for the Northern Division should be by precept required to instruct the *Zilla* Court of *Nellore*, to call upon the Plaintiff to produce further evidence in support of his averments, with liberty to the Defendant to disprove the same.

Additional evidence was accordingly produced to prove the dealings between the parties and the due execution of the instrument; and the record, together with the transcript of the additional evidence, having been transmitted to the *Sudder Adawlut* of *Madras*, that Court, on the 20th of *July* 1831, pronounced their decree, in which, after stating the circumstances of the case, they proceeded as follows:—"The original of the bond, which is the subject of the present action, has been destroyed, as the Plaintiff averred, by accident; and the first question for consideration is, whether the copy taken from the register of the *Zilla* Court ought to have been received in evidence under sec. 11, Reg. XVII. of 1802, which provides, 'that such copies, in the event of the originals being lost, destroyed or not forthcoming, shall be received as sufficient evidence of such deeds in all Courts of justice whatever, proof being made by the subscribing witnesses to the original deed, that the original was duly executed.' The Plaintiff produced in the *Zilla*

Court what he alleged were the fragments of the original bond which had been accidentally destroyed by vermin in the interval between the institution of the suit and the filing of his reply, and their appearance did not excite any suspicion. The fragments, however, on being examined by the Provincial Court, are stated to have betrayed the evident use of scissors, and to contain words, sums and dates not to be discovered in the copy of the bond filed of record. Now, even on the supposition that the original, for whatever cause, had been wilfully destroyed by the Plaintiff, it is impossible to believe for a moment that care would not have been taken to give to the fragments the appearance at least of the original having been reduced to that state by vermin; or on the supposition that the fragments produced were not those of the bond in question, that care would have been taken to allow no word, sum or date to remain legible, which did not appear in the bond of which they were alleged to be the fragments. Even supposing that the Plaintiff was stupid enough, or had the effrontery, to produce as fragments of a bond destroyed by vermin, scraps of paper which, on the very face of them, betrayed the evident use of scissors, it seems incredible that the imposition should have escaped immediate detection; and the Court think it must be inferred, there must have been some remissness in the custody of these papers, between their first production in the *Zilla* Court, and the examination of the record by the Provincial Court, and that advantage was taken of it to give to the fragments now in the record, the suspicious appearance which they bear. This could only have been done to serve the cause of the Defendant, by throwing discredit upon the best, if not the only

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proof which the Plaintiff could produce of the accidental destruction of the bond; and the Court, under all the circumstances, are satisfied that a sufficient foundation was laid for the admission of the copy in evidence." The decree then proceeded to declare that the bond was properly registered, and that it was clear, from the documentary evidence filed in the cause, that there had been dealings and agricultural transactions between the parties previous to the execution of the bond, and that, in respect to the execution of the bond, the Court did not entertain the least doubt. And the *Sudder* Court accordingly set aside the decree of the Provincial Court, and adjudged the present Appellant to pay to the Respondent the amount claimed, being R. 1,853. 12. 3., together with interest at twelve per cent. per annum, on the principal sum of R. 770, from the date on which the plaint was filed, up to the date of the decree, with all costs of suit.

From this decree the present appeal was brought.

Mr. *L. Wigram*, Q. C., and Mr. *Jackson*, for the Appellant.

The main question is, whether the registered copy of the alleged mortgage bond was properly received in evidence. This divides itself into two heads of objection:—first; there is no evidence of the loss or destruction of the bond, nor even of the circumstances in connection with which the bond is alleged to have been lost. Secondary evidence was not admissible without proof of the destruction or loss of the original instrument; and no such evidence was given by the Respondent as could justify the admission of secondary proof. Moreover, the appearance of the fragments produced, disproved

the allegation of their having been destroyed by rats, or of being even fragments of the bond in question. [Vice-Chancellor KNIGHT BRUCE.—The material evidence was the bond itself; failing that, evidence should have been given of its destruction. Secondary evidence can only be received, when the absence of the bond is accounted for.] The *onus* lay upon the Plaintiff to prove its absence or destruction, which they failed to do, or even to identify the fragments as forming part of the alleged bond. [Lord BROUGHAM.—It is not upon the fragments the case rests, but upon the requiring of secondary evidence. The fragments did not open the door to secondary evidence. The Judge seems to have assumed, without evidence, that these scraps were portions of the bond; and these scraps, it appears, do not agree with the description on the Registry. It is exactly as if this were to take place at Nisi Prius; an action upon a bond, and the Plaintiff produces, from an attorney's office, the draft from which these fragments were copied; to let in this draft, the first thing would be to prove that the fragments were the bond declared upon, and put in suit, and then if there appeared a discrepancy between the fragments produced, and the draft, that would be fatal; he would be nonsuited in two moments.] Secondly, the registration of the alleged bond in question was irregular and invalid, according to cl. 2, sec. 9, Reg. XVII. of 1802, for want of the oath required by the Regulation, for neither the Appellant nor any authorized representative, competent to prove the execution, attended at the Registry office.

Their Lordships here stopped the Appellant's counsel, and called upon the Respondent's counsel, to argue

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whether there was any evidence of the loss of the bond, so as to let in secondary evidence.

Mr. *Burge*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

The difficulty which the Respondent labours under, in the deficiency of the proof of the destruction of the bond, is owing to the limit which has been put upon his proof by the *Zilla* Judge. The Court acted under the provisions of cl. 3, sec. 10, Reg. XV. 1816, which enacts that the Court shall consider and record the point or points to be established, and shall proceed to take the evidence that may be adduced upon such point. The Court, in this case, acting under that Regulation, confines the Respondent simply to produce the fragments. In effect, the Court says, do not bring forward evidence to prove the fact of destruction, but bring forward the fragments of the original bond. In considering this strict and technical objection to the admission of the registered copy, now urged for the first time, it should be remembered that the natives of *India* are ignorant of the mode and technical forms of procedure; and this Regulation calls upon the Court to do that which no other Court in the world does,—to point out what the parties are to confine their proof to. If there is a defect of proof of the loss or destruction of the original bond, so as to admit the registered copy as secondary evidence, the cause can be remitted to the *Zilla* Court, to enable the Respondent to produce evidence of the loss, which he was only prevented from doing by the order of the Court. It would be a great hardship, and operate as a denial of justice, if he is now to

suffer for that which was no negligence on his part. It was the duty of the Judge, under sec. 10, Reg. XV. of 1816, to have called for the requisite evidence.

Lord BROUGHAM:

For the reasons which have been repeatedly thrown out by their Lordships in the course of the argument, and which led to our stopping Mr. *Wigram* for the Appellant, and calling upon the other side, their Lordships are clearly of opinion that this decree of the *Sudder* Court cannot stand, and the only question remaining for our consideration has been that which the counsel for the Respondent threw out for our consideration, and which we took up in the course of the Respondent's argument, whether we ought to reverse the decree at once, though without costs (either below or here, of course), or send it back to enable further inquiry. We have considered the matter in all its lights, and we have come to the opinion that we ought not to send the matter back. Therefore the causes will be retained, and the decree below reversed, without costs, dismissing the Appellant below without costs, leaving the causes exactly as they lay when brought into the Court below.

AGA KURBOOLIE MAHOMED and Others, *Appellants*,

AND

THE QUEEN on the prosecution of MAHOMED KULI MIRZA - - - - } *Respondent.**

On Appeal from the Supreme Court of Calcutta.

Heard exparte.

17th June 1843.

A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance by the outer door, but before he could make an actual arrest, was forcibly expelled from the house, and the outer door fastened against him. The officer obtained assistance, broke open the outer door, and made the arrest. Held that the officer was justified in so doing.

INDICTMENT at the Criminal Sessions held at *Calcutta* in 1841. The indictment contained three counts. The first count charged the Appellants with having assaulted and beat the prosecutor; the second, that they assaulted and imprisoned him; the third with an assault and battery in the common form. Plea, not guilty.

At the trial it appeared in evidence that one of the Defendants, *Mirza Allu Aukbur* (one of the Appellants), had brought an action, which was then pending in the Supreme Court, against the prosecutor, *Mahomed Kuli Mirza*, and had sued out and delivered to the sheriff of *Calcutta* a *capies ad respondendum*, for the purpose of arresting and holding the prosecutor to bail in that action. The sheriff's warrant was deli-

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Campbell, the Vice-Chancellor Knight Bruce, and The Right Hon. Dr. Lushington.

Privy Councillor,—*Assessor*,—Sir Edward Ryan.

Held also, that demand of re-entry, under such circumstances, was not requisite to justify his breaking open the outer door.

Quære. If indictment for assault and false imprisonment will, under such circumstances, lie against the sheriff's officer.

vered to one *Board*, for the purpose of arresting the prosecutor under the writ, and notice was given on the same day to the prosecutor, by the Plaintiff in the action, that he would be arrested on that day at his suit. The sheriff's officer and assistant, in the afternoon of the same day, went to the prosecutor's house for the purpose of arresting him under the writ. Upon their arrival, they found the outer door open, and entered; but before the officer could make an actual arrest of the prosecutor, he and his assistants were expelled from the house, and the outer door immediately closed and fastened. Upon the officer being so expelled, he sent to a police station for some police officers, and the outer door was by his authority broken open. It appeared that during the time the door was being broken open, the prosecutor fired a pistol twice or thrice from his house, apparently at the persons engaged in entering, but which he swore at the trial, was loaded with powder only.

Upon the trial there was conflicting evidence, whether the sheriff's officers had in the first instance, before they were expelled, given express notice to the prosecutor of the purpose for which they entered. Evidence was given to show that the persons in the house, who in aid of the prosecutor expelled the sheriff's officer and his assistants, knew the purpose for which he entered. There was no evidence that the prosecutor demanded to see the warrant, or to know the authority of the sheriff's officer in entering, or that he offered to submit to the arrest. Neither was there any evidence of an express demand of admission before the outer door was broken. The evidence conflicted as to any violence or circumstances of aggravation.

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The Judge (Sir *John Peter Grant*), in his charge to the jury, told them, that the assault and imprisonment were admitted, but justified; that the battery and aggravations of the assault were denied; and that the first question, therefore, for their consideration, was, whether the prosecutor was beaten, and whether the assault committed was attended with the aggravations alleged, or any great aggravations. Having recapitulated the evidence upon these points, the learned Judge stated "that the second point to be considered was, under what circumstances, the beating, and other aggravations of the assault, and the assault and imprisonment themselves, were committed. That what the jury had to try was not any assault or violence offered to the sheriff's officer before the door was broken open: that for such violence, if offered, the officer had his remedy by action of damages or indictment, but could not offer it as a defence of an unlawful arrest: that the only question to be tried upon this point was, whether this arrest upon civil process, at the instance of a private individual, was a lawful arrest: that the rule of law is, that a man's house is his castle, and that the officer cannot justify the breaking an outer door or window to execute civil process at the suit of a subject; and his house is that place which he occupies, having his domicile and ordinary residence there: that, if the door be open, the officer may enter and execute the process upon the person or the goods, as the case may be; but that, if before any execution of the process he be thrust out, and the door shut, this latter act is no more than the owner of the house may well do, *scilicet*, to shut the door of his own house; and this, although he is not ignorant of the purpose of the officer's coming—for there must be certain and

direct proof that those in the house had notice of the process of the law, to make the act of his thrusting them out, unlawful: that if a man be legally arrested and escape, and take shelter in his own house, the officer, upon fresh suit, may break open doors in order to retake him; but that, in order to justify the proceeding to that extremity, two things are necessary—first, that the person have previously been lawfully arrested; second, that due notice have been given by the officer of his business, and admission demanded and refused: that in order to constitute a lawful arrest, one of two things is necessary—either that the bailiff or his assistant have laid hold of or touched the person meant to be arrested; or that the person, upon being informed of the bailiff's business, has submitted and gone with the bailiff, without resistance or flight; for bare words will not make an arrest, nor will an assault upon the officer, or offer of violence to him, whereby, through intimidation or otherwise, he is prevented from completing his arrest, convert that into a lawful arrest, which is not completed: that without a valid arrest there can be no rescous or escape, and without a rescous there can be no lawful breaking of doors to effect an arrest on civil process at the suit of a subject; but that, if there had been a rescous, and the breaking doors had been lawful, there must have been previous notice duly given, admittance duly demanded and refused. It is no light matter by the law of *England* to violate the sanctity of a man's house."

Upon this direction the Defendants were found guilty. A rule *nisi* was granted in the ensuing term for setting aside the verdict, and having a new trial, upon three grounds—first, that the verdict was against

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evidence as to certain of the Defendants mentioned in the rule; second, as to the Appellant, *Aga Kurboolie Mahomed*, that there was no evidence at all to go to the jury; thirdly, that the learned Judge had misdirected the jury.

This rule was afterwards, on the 29th of *November* 1841, discharged without costs. (Sir *Edward Ryan* dissenting.) The Court at the same time gave leave to the Defendants to appeal to Her Majesty in Council, from its judgment refusing a new trial, upon one ground only, namely, on the ground of the alleged misdirection.*

The Solicitor-General (Sir *William Follett*), and Mr. *Greenwood*, for the Appellant.

The charge of the learned Judge to the jury was a misdirection in law; and the rule *nisi* for a new trial, upon the ground of such misdirection, ought to have been made absolute, and not discharged. The sheriff's officer was justified, although he had not actually arrested the prosecutor, in breaking open the door and arresting him after he had obtained peaceable entry. The maxim, "that every man's house is his castle," must be qualified. In all cases where the outer door is open, the sheriff may enter the house, and do execution. *Semayne's* case (*a*). In *White* v. *Wiltshire* (*b*), the Court said, though the sheriff cannot break into a house to make an execution by a *fi. fa.*, yet when the door is open, and he enters and is disturbed in his execution by the parties who are within

* As to the power of the Supreme Court to allow or deny Appeals in criminal cases, and to impose terms upon which such Appeals shall be allowed; see *Bengal Charter of Justice*, 26th March, 1774, sec. 32.

(*a*) 5 Coke, 91, 4th Res.

(*b*) Palm. 52. 2 Rolle Rep. 137. Cro. Jac. 555.

the house, he may break into the house and rescue his bailiffs. Here the breaking open of the house was justified, the Plaintiff having occasioned the necessity of it. Having obtained peaceable entrance, the sheriff may afterwards break open the inner door, to execute process. *Lee* v. *Gansel* (*a*), *Lloyd* v. *Sandilands* (*b*), Sir *M. Foster's* Discourse on Homicide, p. 319. He may even, if once lawfully admitted, break open the outer door, if fastened against him, to get out. *Pugh* v. *Griffith* (*c*). Again, if the Defendant, after being arrested, escape, the sheriff may break open either his own house, or that of a stranger, for the purpose of retaking him. *Anon.* (*d*)

The prosecutor had notice of the intended writ, and evidence was given, and not contradicted, to show that the persons in the house, who in aid of the prosecutor expelled the sheriff's officer and his assistants, knew the purpose for which he entered. No proof, it is true, was given of an express demand of re-admission; the circumstances and conduct of the prosecutor prevented that, before the outer door was broken open; but there was evidence from which the jury might have inferred that the prosecutor knew the purpose for which the door was broken, and the authority under which the sheriff and his assistants acted. No express demand and refusal of re-entry was necessary. *Hutchison* v. *Birch* (*e*). *Pews's* case (*f*). The circumstances of each case must determine the propriety of demand of re-entry and refusal. *Pugh* v. *Griffith* (*g*).

(*a*) 1 Cowp. 1. Lofft. 374.
(*b*) 8 Taunt. 250.
(*c*) 7 Adol. & El. 827.
(*d*) 6 Mod. 105. Lofft. 390.
(*e*) 4 Taunt. 619.
(*f*) Hale, P. C. 458.
(*g*) 7 Ad. & El. 827.

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If the breaking open of the outer door was an unlawful act, the arrest under the writ could not be made the subject of an indictment for assault and false imprisonment. Lord *Mansfield*, in *Lee* v. *Gansel* (*a*), cited *Semayne's* case (*b*), as deciding "that breaking open the outer door was a trespass, but that taking away goods under a *fi. fa.* was lawful." Indictment cannot lie: in this case it can only at most render the sheriff's officer liable to an action of trespass. *Hutchison* v. *Birch*. *Bacon's* Abr. Execution N. *Pasch.* 4 Ed. 4. pl. 19, cited 4 Taunt. 624.

Lord CAMPBELL,—

24th June 1843.

After stating the nature and facts of the case, proceeded.

It was argued before us on the part of the Appellants, that the learned Judge at the trial ought to have directed the jury that if they believed the evidence for the Defendants, they should find a verdict of acquittal; and three points were made by way of exception to his charge. First, that although the prosecutor had not been arrested before the officer and those acting in his aid were expelled from the house, they were entitled to break open the outer door for the purpose of re-entering and arresting him; secondly, that under the circumstances they were entitled to do so without making any express demand for leave to re-enter; and, thirdly, that even if the breaking of the outer door was unlawful, the arrest under the writ and warrant could not be treated as a trespass, and could not be made the subject of an action or indictment for assault and false imprisonment.

(*a*) 1 Cowp. 6. (*b*) 5 Coke, 91.

Having examined the authorities from *Semayne's* case downwards, their Lordships are clearly of opinion, that the two first points ought to be decided in favour of the Appellants, so that, independently of the third, the judgment of the Court below must be reversed.

There is no doubt that a man's house being his castle, the ordinary rule is, that the outer door cannot be broken open to execute civil process; but it is admitted here, that if the prosecutor had been arrested, and had then expelled the Defendants from his house, they might have broken open the outer door to enter and retake him; and their Lordships think that as they had once been lawfully in the house, and he knew that they were lawfully about to arrest him, and he unlawfully caused them to be expelled for the purpose of preventing them from so doing, he cannot be permitted to take advantage of his own wrong, by thus defeating the process of the law; and that they had a right to place themselves in the position which they occupied when his unlawful act began. Without an actual arrest, there was no rescous or escape; but the proposition, that till an actual arrest had taken place, the prosecutor might forcibly expel the officer and those acting in his aid, and lock the outer door, so as to entitle himself to the protection of his castle, cannot be supported. The outer door being open, they were entitled to enter the house under civil process; and they being lawfully in the house, to arrest him, he was guilty of a trespass by expelling them. The act of locking the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act.

Again, there is no doubt that, generally speaking,

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before an outer door can be broken open, even to execute criminal process, there must be a demand of entry, and a refusal. But to what extent? To inform the owners of the house of the purpose for which the entry is to be made, and to afford him the opportunity of opening the door and personally admitting the parties who are to execute the process of the law. Here the prosecutor, who had just expelled the Defendants from his house, that they might not arrest him, full well knew the purpose for which they returned, and he showed a determined resolution to oppose their admission. While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary. *White* v. *Wiltshire*. *Pugh* v. *Griffith*.

This being so, there was no infraction of the law by the Defendants, and no objection can be made to the regularity of the arrest. Whether supposing the breaking open the outer door and the second entrance into the house to have been illegal, this indictment would have been maintainable, it is not now necessary to determine. From *Cameron* v. *Lightfoot* (2 W. Bla. Rep. 1190), *Tarlton* v. *Fisher* (Doug. 671), *Stokes* v. *White* (1 Cr. Mee. & Ros. 223), and *Newton* v. *Constable* (2 Ad. & Ell. N. S. 157), it appears that an action of trespass and false imprisonment will not lie at the suit of a person who is arrested under a writ and warrant for debt, when privileged from arrest, by attending as a witness under a subpœna, from which it may be argued that here the prosecutor would be confined to his remedy, either civil or criminal, for

forcibly breaking and entering his dwelling-house, and that the simple arrest cannot be made the subject of an indictment, nor of an action of trespass. On the other hand, it has been determined in *Hodson* v. *Towning* (B. R. H. T. 1837, *Willmore*, *Wollaston* & *Dawson*, 53), that the arrest of a party in his house, after breaking open the outer door, is so far unlawful, that he is entitled to be discharged; and the arrest of the person under civil process, like seizing goods as a distress for rent, after breaking open the outer door, may be considered a continuation of the trespass. However, it is enough for the present, to say, that from the misdirection of the learned Judge at the trial, with respect to the right to break open the outer door of the prosecutor's house, and the necessity of a previous demand and refusal to be admitted, the conviction cannot stand. Their Lordships can only report to Her Majesty that the rule for a new trial should be made absolute; but after this intimation of their opinion, they trust that the indictment will not be further prosecuted.

Note.—It will not be unimportant here to note the distinction between process at the suit of the Crown, and that of an individual. This was recognised in *Burdett* v. *Abbott* (14 East. 167), *Launock* v. *Brown* (2 Barn. & Ald. 592), 2 Hale. P. C. 117. The following summary of the law upon this subject, alluded to in the argument, will be found in Sir *Michael Foster's* Discourse on Homicide, pp. 319, 320:—

"The officer cannot justify breaking open an outward door or window in order to execute process in a civil suit; if he do, he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door is opened to him from within, and he entereth, he may break open inward doors, if he findeth that necessary, in order to execute his process.

"The rule that 'every man's house is his castle,' when applied to

arrests in legal process, hath been carried as far as the true principles of political justice will warrant; perhaps beyond what, in the scale of sound reason and good policy, they will warrant. But this rule is not one of those that will admit of any extension; it must, therefore, as I have before hinted, be confined to the breach of windows and outward doors, intended for the security of the house against persons from without endeavouring to break in.

"It must likewise be confined to a breach of the house in order to arrest the occupier, or any of his family, who have their domicile, their ordinary domicile, there; for if a stranger, whose ordinary residence is elsewhere, upon a pursuit taketh refuge in the house of another, this is not his castle, he cannot claim the benefit of sanctuary in it.

"The rule is likewise confined to cases of arrests in the first instance; for, if a man, being legally arrested (and laying hold of the prisoner, and pronouncing the words of arrest, is an actual arrest), escapes from the officer, and takes shelter, though in his own house, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business, and demanded admission and been refused.

"And let it be remembered, that not only in this, but in every case where doors may be broken open in order to arrest, whether in cases criminal or civil, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity.

"The rule already mentioned must also be confined to the case of arrest upon process in civil suits; for, where a felony hath been committed, or a dangerous wound given, or even where a minister of justice comes armed with process, founded on a breach of the peace, the party's own house is no sanctuary for him. Doors may in any of these cases be forced; the notification, demand and refusal before mentioned having been previously made. In these cases the jealousy with which the law watches over the public tranquillity (a laudable jealousy it is), the principle of political justice, I mean the justice which is due to the community, *ne maleficia remaneant impunita*, all conspire to supersede every pretence of private inconvenience, and oblige us to regard the dwellings of malefactors, when shut against the demands of public justice, as no better than the dens of thieves and murderers, and to treat them accordingly. But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate grounded on such suspicion."

APPENDIX.

RULE issued by the Judicial Committee, directing Judges of the Courts in the Colonies and Foreign Settlements of the Crown to give their reasons in writing for the Judgment appealed from; and to transmit the same with the Record.

At the Council Chamber, Whitehall, the 12th of *February*, 1845.

By the Judicial Committee of the Privy Council.

WHEREAS by an Act passed in the Eighth year of Her Majesty's reign, intituled, "An Act for amending an Act passed "in the fourth year of the reign of His late Majesty, enti-"tled, *An Act for the better administration of Justice in His "Majesty's Privy Council,* and to extend its jurisdiction and "powers," it was enacted, "that it should be lawful for the "Judicial Committee of the Privy Council to make any "general rule or regulation to be binding upon all Courts in "the Colonies, and other foreign settlements of the Crown, "requiring the Judge's notes of the evidence taken before "such Court on any cause appealed, and of the reasons "given by the Judges of such Court, or by any of them, for "or against the judgment pronounced by such Court, which "notes of evidence and reasons should by such Court be "transmitted to the Clerk of the Privy Council within one "calendar month next after the leave given by such Court to "prosecute any appeal to Her Majesty in Council, and such "order of the said Committee should be binding upon all "Judges of such Courts in the Colonies or Foreign Settle-"ments of the Crown." NOW, THEREFORE, the Lords of

the said Judicial Committee of the Privy Council are pleased to order, as it is hereby ordered, that when any Appeal shall be prosecuted from any judgment of any Court in the Colonies or Foreign Settlements of the Crown, the reasons given by the Judges of such Court for or against such judgment shall be, by the Judge or Judges of such Court, communicated in writing to the Registrar of such Court, or other officer, whose duty it is to prepare and certify the transcript record of the proceedings in the cause, and that the same be by him transmitted in original to the Clerk of Her Majesty's Privy Council, at the same time when the documents and proceedings proper to be laid before Her Majesty in Council upon the hearing of the Appeal are transmitted.

Whereof the Judges of all such Courts in the Colonies or Foreign Settlements of the Crown are to take notice, and govern themselves accordingly.

C. C. GREVILLE.